COPY

(2)

Supreme Court, U.S.
FILED

No. 001322 FEB 14 2001

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

APPENDICES
PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
SUSAN RANKIN BUNTING
Deputy Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Fax: (916) 324-2960
Counsel for Respondent

395 pp

INDEX

	Page
Ninth Circuit Court of Appeals Opinion (No. 99-99028)	1-10
Ninth Circuit Court of Appeals Order Denying Rehearing	11
Order Granting Respondent's Motion for Summary Judgment and Denying Petition for Writ of Habeas Corpus (United States District Court No. CIV S 92-0483 EJG GGH P	12-23
Finding and Recommendations filed May 27, 1997 (United States District Court No. CIV S 92-0483 EJG GGH P)	24-64
Finding and Recommendations filed August 4, 1998 (United States District Court No. CIV S 92-0483 EJG GGH P)	65-227
Petition for Writ of Habeas Corpus (California Supreme Court No. S004781)	228-293
California Supreme Court Order Denying Petition for Writ of Habeas Corpus (No. S004781)	294
Petitioner's Motion for Discovery (United States District Court No. CIV S 92-0483 EJG GGH P)	295-312
Petitioner's Reply to Summary Judgment Motion (United States District Court No. CIV S 92-0483 EJG GGH P)	313-383
Memorandum Re: Filing of State Habeas Petition (United States District Court No. CIV S 92-0483 EJG GGH P)	384-387
Statutes and Rules Involved in the Case	388-393

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS Petitioner-Appellant v. JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin Respondent-Appellee.)	)	No. 99-99028 D.C. No. CV-92-00483-EJG-GGH OPINION

Appeal from the United States District Court
for the Eastern District of CaliforniaEdward J. Garcia,
District Judge, Presiding
Argued and Submitted
July 10, 2000--Portland, Oregon
Submission Deferred July 12, 2000
Resubmitted August 15, 2000
Filed October 5, 2000

Before: Warren J. Ferguson, Susan P. Graber, and
William A. Fletcher, Circuit Judges.

Opinion by Judge Graber

COUNSEL

Marianne D. Bachers, San Francisco, California, and Tony Tamburello, Tamburello, Hanlon & Waggener, San

Francisco, California, for the petitioner-appellant.

Ward A. Campbell and Susan Rankin Bunting, Deputy Attorneys General, Sacramento, California, for the respondent-appellee.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas, Nevada, for the amicus curiae.

OPINION

GRABER, Circuit Judge:

Petitioner Bruce Wayne Morris was sentenced to death in California for the 1985 murder of Rickey Van Zandt. He appeals the district court's denial, on summary judgment, of his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

EARLIER PROCEEDINGS

At the close of the guilt phase of the trial, on June 22, 1987, the jury found Petitioner guilty of first-degree murder and robbery and further found the special circumstance that Petitioner had committed the murder during the commission of the robbery.

The trial moved to a penalty phase. Evidence was introduced in mitigation and aggravation. At the close of the evidence, the jury retired to deliberate. After requesting that the district court clarify a jury instruction, the jury sentenced Petitioner to death.

Petitioner appealed. While his appeal was pending in state court, he filed his first state petition for a writ of habeas corpus in the California Supreme Court. That petition was denied on September 7, 1990.

On March 28, 1991, a divided California Supreme Court affirmed Petitioner's conviction and sentence of death on direct appeal. *See People v. Morris*, 807 P.2d 949 (Cal.), cert.

denied, 502 U.S. 959 (1991).

On March 27, 1992, Petitioner filed an application for stay of execution and a request for appointment of counsel in federal court. Counsel was appointed in August 1992. On June 15, 1993, Petitioner filed a petition for habeas corpus in federal district court. The state moved to dismiss for failure to exhaust state remedies. On December 6, 1993, the district court granted in part the motion to dismiss and issued an order staying the case to allow Petitioner to exhaust state remedies.

On December 1, 1995, Petitioner filed a second petition for habeas corpus in state court. The California Supreme Court denied the petition in a one-page order filed on December 6, 1995. In that order, the court concluded that the petition was "untimely" under *In re Clark*, 855 P.2d 729, 737-40 (Cal. 1993). The court also denied the petition "on the merits," but without elaboration.

Petitioner returned to federal court and, on January 17, 1996, filed his first amended petition for habeas corpus. That petition is the subject of this appeal.

On May 15, 1996, the state moved for summary judgment. In its motion, the state argued (among other things) that all the claims that Petitioner had raised in his second state-court petition for habeas corpus were procedurally barred in federal court as a result of the denial of the state petition on procedural grounds. The state also argued that several other of Petitioner's claims were procedurally barred because Petitioner had waived them or had failed to exhaust state remedies. The magistrate judge agreed and, on May 27, 1997, recommended that all or part of 13 of Petitioner's claims be denied on procedural grounds. The district court adopted the magistrate judge's recommendation.

The magistrate judge then addressed the remainder of Petitioner's claims on the merits. On March 3, 1998, the magistrate judge issued Findings and Recommendations on claims 36 and 40 of Petitioner's petition. Those claims address an error in a printed instruction that was given to the jury during the penalty phase. The magistrate judge recommended that those claims be granted and that Petitioner receive a new

penalty-phase trial.

On August 4, 1998, the magistrate judge issued Findings and Recommendations on Petitioner's remaining claims. The magistrate judge recommended that those claims be denied.

On June 3, 1999, the district court issued an order granting the state's motion for summary judgment as to all of Petitioner's claims. The district court rejected the magistrate judge's recommendation as to claims 36 and 40, concluding that the error in the jury instruction, if any, was harmless. The court adopted without discussion the magistrate judge's recommendation that the remaining claims be denied.

Petitioner then filed a request for a Certificate of Probable Cause (CPC), which the district court granted. This timely appeal followed.

STANDARD OF REVIEW

[1] This court reviews de novo a district court's decision to deny a petition under 28 U.S.C. § 2254. *See McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam). Because Petitioner filed his petition before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), the provisions of that Act do not apply to the merits of this appeal. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). However, AEDPA's procedural requirements do apply, because Petitioner filed his notice of appeal after the statute's effective date. *See Slack v. McDaniel*, 120 S. Ct. 1595, 1603 (2000).

DISCUSSION

I. Petitioner's Certificate of Probable Cause

[2] Before Congress enacted AEDPA, a party who wished to appeal a district court's denial of a petition for habeas corpus was required to obtain a CPC, as Petitioner did in this case. To obtain a CPC, a petitioner was required to make a "substantial showing of the denial of [a] federal right."

Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (citation and internal quotation marks omitted). If a petitioner made such a showing as to any issue in his petition, then all the issues in the petition could be appealed. *See Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994).

Congress changed that requirement with the passage of AEDPA, substituting the certificate of appealability (COA) for the CPC. Unlike a CPC, which allows a party to appeal an entire petition, a COA is granted on an issue-by-issue basis. A petitioner specifically must request a COA as to each issue that he or she wishes to appeal, and a court may not consider on appeal any issue not specified in a COA. *See* 28 U.S.C. § 2253(c); *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999).

Before *Slack v. McDaniel*, the rule in this circuit was that the new requirement of a COA did not apply in cases that were filed in the district court before the effective date of AEDPA. *See, e.g., Fuller v. Roe*, 182 F.3d 699, 702-03 (9th Cir. 1999) (as amended). Thus, a petitioner who filed a petition for habeas corpus before AEDPA was required in this circuit to obtain a CPC, not a COA, even if the petitioner filed his or her notice of appeal after AEDPA.

However, *Slack* overruled circuit law on this issue. *See Slack*, 120 S. Ct. at 1603. In *Slack*, the Supreme Court held that, because the petitioner had sought appellate review after AEDPA's effective date, the provisions of AEDPA his appeal, even though he had filed his petition before AEDPA took effect. Specifically, the requirement for a COA -- not a CPC -- applied. *See id.*

[3] Under *Slack*, then, Petitioner was required to obtain an issue-by-issue COA. Through no fault of his own, he obtained a CPC instead. In cases in which *Slack* has had this effect, we treat the petitioner's notice of appeal as a request for a COA on the issues raised in the briefs, and we grant a COA on those issues as to which the petitioner has made the requisite "substantial showing of the denial of a constitutional right." *Schell v. Witek*, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000).

Under that new procedure, we turn to the claims that Petitioner raises on appeal. As noted, Petitioner raised 43

claims in his petition, all of which the district court denied. Petitioner does not present to this court any argument concerning a number of those claims. Petitioner has abandoned those claims that he does not address in his briefs. *See Poland v. Stewart*, 169 F.3d 573, 590 (9th Cir. 1999) (as amended).

The claims on which Petitioner does seek a COA fall into two categories: claims that were denied on the merits, and claims that were denied on procedural grounds.

A. Claims that the District Court Denied on the Merits

[4] We conclude that Petitioner has made a substantial showing of the denial of a constitutional right as to the following issues, which the district court resolved on the merits: (1) whether the trial court's comments to the jury violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as alleged in Claim 24; (2) whether the district court's guilt-phase instruction concerning accomplice liability denied Petitioner a fair trial, as alleged in Claim 14; (3) whether Avette Barrett's and Allison Eckstrom's plea agreements were unduly coercive, as alleged in Claims 1 and 2;[1] and (4) whether Special Instruction 60, which the district court gave during the penalty phase, denied Petitioner a fair trial, as alleged in Claims 36 and 40.

[5] We hereby grant a COA as to those issues.

B. Claims that the District Court Dismissed on Procedural Grounds

---

1. In his briefs to this court, Petitioner combines that argument with an argument that the state improperly "vouched" for Barrett and Eckstrom, both in the plea agreements themselves and at trial. Petitioner did not present that "vouching" argument in state court or in district court. Accordingly, the argument is unexhausted and unpreserved, and we will not consider it on appeal. We write only to make clear that Petitioner's arguments about vouching are not included in the COA, even though we grant a COA on the question whether the plea agreements were unduly coercive.

[6] In Slack, the Court set out a two-step analysis for deciding whether to grant a COA when a district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim." *Slack*, 120 S. Ct. at 1604. In those circumstances, a COA should issue if the prisoner can show: (1) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"; and (2) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Id.*

Here, Petitioner appeals the district court's dismissal, on procedural grounds, of all or part of Claims 8, 17, 37, and 38. In determining whether to grant a COA on those claims, we apply the two-step analysis from *Slack*.

[7] First, we consider whether the district court's procedural ruling was debatable among jurists of reason. We conclude that it was. The district court dismissed the claims on the ground that they previously had been denied by the California Supreme Court on an independent and adequate state-law ground. In a federal habeas action brought by a state prisoner under 28 U.S.C. § 2254, a federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

[8] In this case, the California Supreme Court had denied Petitioner's second state-court petition because it was untimely under the holding of *Clark*, 855 P.2d at 737-40. The district court concluded that the California Supreme Court's "untimeliness" decision rested on an "independent and adequate" state-law ground and denied those claims (which Petitioner also had presented in the second state-court petition) on that basis. However, this court has held that the "untimeliness" bar from *Clark* is not an independent and adequate state-law ground. *See La Crosse v. Kernan*, 211 F.3d

468, 474 (9th Cir. 2000).[2/] Accordingly, the California Supreme Court's denial, under *Clark*, of Defendant's second state habeas petition does not bar federal review of claims raised in that petition. See id. The district court's holding that all or parts of claims 8, 17, 37, and 38 are procedurally barred, then, is incorrect.

[9] Because the district court's procedural ruling was incorrect, we must issue a COA if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack, 120 S. Ct. at 1604. In completing that second step of the two-step Slack analysis, we are guided by this court's recent decision in Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000). Under Lambright, our task is "simply [to] take a quick look at the face of the complaint to determine whether the petitioner has facially allege[d] the denial of a constitutional right." Id. at 1026 (citations and internal quotation marks omitted). Any claims that satisfy that "modest standard," id. at 1027, must receive a COA.

[10] We conclude that three of the four procedurally barred issues that Petitioner raises meet that standard. Those issues are: (1) whether Petitioner received ineffective assistance of counsel, as alleged in claim 37; (2) whether Petitioner was denied a fair trial by the state's erroneous introduction of excluded evidence, as alleged in Claim 8; and (3) whether Petitioner was incompetent to aid and assist in his own defense, as alleged in claim 38.

[11] We hereby grant a COA as to those issues.

II. Factual Development of Claims that Were Denied on Procedural Grounds Petitioner argues that he is entitled to further factual development as to his claims of ineffective assistance of counsel and incompetence to aid and assist counsel. In his petition, he requested an evidentiary hearing on

---

2. The *La Crosse* panel recently withdrew its opinion, see 2000 WL 1292718 (9th Cir. Sept. 8, 2000), and has not issued a replacement opinion. However, we agree with and hereby adopt the reasoning of the withdrawn opinion with respect to the *Clark* issue.

those claims. However, because the district court dismissed the claims on procedural grounds, no evidentiary hearing was held.

[12] "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court. " *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) (as amended). Here, Petitioner has raised colorable claims of ineffective assistance of counsel and incompetence, but has never received an evidentiary hearing on those claims. We hold that Petitioner is entitled to an evidentiary hearing on those claims.[3/]

We also emphasize that a more developed factual record with regard to those claims is necessary for meaningful appellate review. The state argues that the lack of a factual record is Petitioner's fault and that Petitioner's failure to provide more factual support for his claims militates against granting an evidentiary hearing. We agree that a petitioner who negligently fails to develop the material facts supporting a claim at the state-court level generally is not entitled to a federal evidentiary hearing. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992); *Correll v. Stewart*, 137 F.3d 1404, 1413 (9th Cir. 1998). But here, as was the case in *Correll* and *Siripongs*, Petitioner did not receive an evidentiary hearing in state court, either; indeed, his second state-court petition was denied only five days after it was filed. Thus, he has not received an evidentiary hearing on these claims at any level. In the circumstances, we will not address the merits of Petitioner's claims of incompetence and ineffective assistance of counsel without giving him an opportunity for an evidentiary hearing.

Those claims relate to both the guilt phase and the penalty phase of Petitioner's trial. Accordingly, a ruling in Petitioner's favor on either claim would render the rest of his petition moot. In the interest of judicial economy, we will hold

---

3. Petitioner does not argue that he is entitled to an evidentiary hearing as to his claim concerning the state's introduction of excluded evidence at trial. We agree that an evidentiary hearing on that claim is unnecessary, because the factual record has been adequately developed.

in abeyance the remaining claims as to which we have granted a COA, pending the district court's completion of an evidentiary hearing on Petitioner's claims of incompetence and ineffective assistance of counsel.

The judgment of the district court dismissing the petition for habeas corpus is VACATED and the case is REMANDED for an evidentiary hearing on Petitioner's claims of ineffective assistance of counsel and incompetence to aid and assist counsel. We DEFER ruling on those claims for which we have granted a COA, pending the outcome of the district court's evidentiary hearing. The rulings of the district court granting summary judgment for the state on Petitioner's remaining claims are AFFIRMED. This panel shall retain control of the further proceedings in this case.

NOT FOR PUBLICATION

FILED
NOV16 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS	)	No. 99-99028
Petitioner and Appellant,	)	D.C. No.
	)	CV-92-00483-
	)	EJG-GGH
v.	)	
JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin,	)	**ORDER**
Respondent and Appellee.	)	

Before: FERGUSON, GRABER, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Graber and W. Fletcher have voted to deny the petition for rehearing en banc, and Judge Ferguson has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

FILED
JUN - 9 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS,
Petitioner,

v.

ARTHUR CALDERON,

Respondent.

/

CIV. N0. S-92-0483 EJG/GGH P

DEATH PENALTY CASE

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a state prisoner under sentence of death, has filed a petition for a writ of habeas corpus pursuant to 18 U.S.C. § 2254. Respondent has filed a motion for summary judgment, seeking summary adjudication of each of petitioner's claims. The case was referred to Magistrate Judge Gregory G. Hollows pursuant to 28 U.S.C. § 636 and Local Rule 72-302(c)(17). The magistrate judge issued his findings and recommendations in three parts. On March 3, 1998 he issued his findings with respect to claims 36 (in part) and 40, relating to an erroneous jury instruction. On August 4, 1998, he issued his findings and recommendations with respect to all other claims. On November 12, 1998, he issued an order and supplemental findings and recommendations in response to respondent's contention that Chapter 159 of the AEDPA applied to this action. Respondent filed objections to the March 3, 1998 findings and to the November 12, 1998 supplemental findings. In addition, he seeks reconsideration of the November 12, 1998 order. Petitioner filed objections to the August 4, 1998 findings.

After conducting a de novo review of the record, including all objections and responses, and for the reasons set forth below, the court adopts in part and rejects in part the magistrate judge's findings and recommendations. Specifically, the court rejects the March 3, 1998 findings on claims 36 (in 15 part) and 40 that the writ be granted as to the penalty phase, adopts the findings of August 4, 1998 that the writ be denied on the remaining claims, and finds it unnecessary to resolve the issue of Chapter 159's applicability as addressed by the magistrate judge in his November 12, 1998 order and supplemental findings.

In light of Magistrate Judge Hollows' thorough and extensive findings, as set forth in more than 150 pages, which provide detailed factual as well as legal analysis on all the issues in this case, the court will not add to the already heavily burdened record by repeating the analysis. Where necessary this court will, however, provide its reasoning in the areas it disagrees with Magistrate Judge Hollows' conclusions.

DISCUSSION

A. Claims 36 (in part) & 40 (March 3, 1998 findings)

In these claims petitioner contends his sentence of death was unlawfully imposed, in violation of the fifth,'sixth and eighth amendments of the United States Constitution as the result of an erroneous jury instruction given during the penalty phase, which error was magnified by the trial court's failure to clarify the instruction in response to a jury question.[1/] The facts surrounding this claim are set out in detail in the California Supreme Court's opinion, from which the magistrate judge quotes extensively in his findings.

To summarize, during the penalty phase, after having

---

1. Claim 36 also alleges that the court's inquiry into the jury's numerical division at the 22 time of the question was constitutionally impermissible. This issue was addressed in the magistrate judge's August 4, 1998 findings.

heard more than 50 times during the course of the trial that the two sentencing options were either death or life without possibility of parole, and after having been correctly read the instructions concerning the two choices, the jurors were given a written instruction that contained a typographical error concerning the penalty to be imposed.[2/] The language in the instruction contradicted not only the 50 previous references and the court's oral recitation, but the only two sentencing options provided on the verdict forms as well. When the trial judge,in response to a jury request to explain the instruction, told the jurors the instruction was self-explanatory, he compounded the error.[3/] Petitioner argues that the instruction and the judge's response misled the jury about its sentencing choice, in violation of petitioner's constitutional rights.

The California Supreme Court, relying on United States Supreme Court precedent, held that the typographical error did not violate petitioner's constitutional rights."Focusing on the specific language of the erroneous instruction as a reasonable juror would, and considering the context of defendant's trial ... we conclude that there was no `reasonable likelihood' the jury inferred that defendant might receive parole if he were not sentenced to death." People v. Morris, 53 Ca1.3d 152, 231 (1991), overruled on other grounds, People v. Stansbury, 9 Ca1.4th 824, 830 n.l (1995).The court went on to find that to the extent there was any error during the penalty phase it was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967).

The magistrate judge disagrees with the California Supreme Court and, citing McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) as controlling law,finds the jury instruction,

---

2. The instruction as given to the jury stated as follows: "If you have a reasonable doubt as 24 to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison 25 with the possibility of parole." (emphasis added).

3. As explained by the magistrate judge, the typographical error was inadvertent, noticed 25 neither by the court or the parties.

and the judge's response, to be constitutionally infirm. Additionally, the magistrate judge implicitly finds the error was prejudicial, requiring reversal of petitioner's sentence. For the reasons that follow, this court disagrees with Magistrate Judge Hollows' reliance on McDowell.The mistyped instruction, and the judge's failure to remedy it, does not rise to the level of constitutional error. Moreover, even if it was constitutional error, it did not, in the context of the trial as a whole, have a substantial and injurious effect on the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 638(1993).

1. Did constitutional error occur?

McDowell is distinguishable from the instant case for two reasons. First, it did not involve instructional error. In fact, the Ninth Circuit noted that the jury was properly instructed. Rather, McDowell involved jury mistake and confusion concerning mitigation evidence, which claim the court found to be of constitutional magnitude because of a defendant's eighth and fourteenth amendment rights to have mitigating evidence considered before a sentence of death is imposed. McDowell, 130 F.3d at 837. The issue at bar does not involve or impact the constitutional right to have mitigation evidence considered.

Second, the McDowell court wrongly assumed, as did the magistrate judge in the instant case, that there was only one logical interpretation of the jury's question. In McDowell, the court assumed the jury's question concerning whether certain circumstances could be considered as mitigation evidence must mean that eleven members of the jury "erroneously believed they could not consider [certain] aspects of [defendant's) background as mitigating evidence." McDowell, 130 F.3d at 837. However, it is equally plausible that the question raised by the jury in McDowell represented a list of circumstances considered to be mitigating by the sole hold-out juror. In drafting the question the other eleven members of the jury were, in effect, asking the judge whether there was evidence of all of those circumstances in the record. Rather than tell the jury which specific circumstances were supported by evidence and

which were not, the judge elected to have the jurors re-read his previous instruction) which told them they could consider any aspect of defendant's character or background that he offered as a basis for a lesser sentence. Arguably, the judge elected the latter course because he did not want to say anything which could be construed as coercion, given the jury's announcement of its 11-1 stand for death.

Likewise, in the instant case, the magistrate judge focuses on a single interpretation of the jury's question and finds that "the only logical reason to ask a question about the instruction was the very fact that references inconsistent with the possibility of parole had been made." March 3, 1998 findings, 7:10-12. However, this obviates completely the Supreme Court's review of the totality of the trial. Unlike McDowell, the jury here did not indicate a specific concern with the instruction. It merely asked for an explanation. "The reason for its inquiry may or may not have been the typographical error. No juror expressed on the record any belief or concern that defendant might receive parole. The generally phrased request for an explanation did not necessarily signify that jurors espoused any particular belief as to sentencing options." People v. Morris,
953 Ca1.3d at 229.

Moreover, the jury did not return with a follow-up question, which would have been evidence of juror confusion. Given that jurors are presumed to follow the law as it was correctly read and recited to them throughout the trial, the assumption must be that, having re-read the instruction, as directed by the judge; having looked at the verdict forms, which offered only two possible penalties -- death and life without possibility of parole; and, having reflected on the instruction in the context of all the other instructions, the jurors, through their collective debate and discussion, reached the inevitable conclusion that the instruction contained a typographical error. Cf. California v. Brown, 479 U.S. 538, 541 (1987) (challenged instruction cannot be viewed in isolation; court must "review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law."); People v. Cruz, 871 E.2d

101, 103 (9t' Cir. 1989) (typographical error in instruction which made it "incoherent and useless" did not prejudice defendant in light of other instructions).[4]

2. Was the error harmless?

Finally, even if the mistyped instruction and the judge's failure to correct the instruction created constitutional error, the error was harmless. "A constitutionally deficient jury instruction is a trial-type error that is subject to harmless error analysis." Hanna v. Riveland, 87 F.3d 1034, 1938 (9'" Cir. 1996). A federal court collaterally reviewing a state court conviction can grant relief based on trial error only when that error "`had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). If the court, after reviewing the record, has a grave doubt about whether the error is harmless, it should treat it as if it affected the verdict. O'Neal v. McAninch, 115 S.Ct. 992, 994 (1995).

As the Supreme Court recently noted, this standard takes into account the presumption of finality and legality to be accorded a conviction after direct appeal as well as preservation of the extraordinary remedy of habeas corpus for those situations where it is truly warranted. Calderon v. Coleman, 119 S.Ct. 500, 503 (1998)."A federal court upsets this careful balance when it sets aside a state court conviction or sentence

---

4. The court does not suggest that either the Ninth Circuit or Magistrate Judge Hollows are short-sited. The reasons they chose an interpretation which favored the defendant may well have been mandated by precedent. "That reasonable men might derive a meaning from the instructions given[,] other than the proper meaning . . . is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). However, thorough consideration should have been given to other plausible interpretations before they were rejected, something neither the Ninth Circuit in McDowell nor Magistrate Judge Hollows in the instant case appear to have undertaken.

without first determining that the error had a substantial and injurious effect on the jury's verdict." Id.

Analysis of harmless error under the Brecht/O'Neal standard is a three step process. "The federal habeas court must (1) evaluate the error in the context of the entire record;(2) ask whether the constitutional trial error at issue had a `substantial and injurious effect or influence in determining the jury's verdict'; and (3)if the habeas court `is in grave doubt as to the harmlessness of the error that affects substantial rights, it should grant relief.'" Mangus v. Edwards, 1999 WL 166969 *13 (N.D. Ohio, filed March 15, 1999) (internal citations omitted).

Here, the magistrate judge did not engage in this analysis, or, if he did so, it was only by implicit adoption of McDowell: "If McDowell is to be followed, the error seriously affected the fairness and integrity of the judicial proceedings." March 3, 1998 findings, 13:12-13. This does not satisfy the Brecht/O'Neal test. Moreover, to the extent the magistrate judge relies upon McDowell's harmless error analysis, which in turn utilized the "reasonable likelihood" language of Boyde v. California to find the error harmful, his reliance is misplaced.

The Supreme Court has recently cast doubt on the Ninth Circuit's use of Boyde to determine harmless error, thus seriously undercutting the import of McDowell. In McDowell the court looked to Boyde for guidance in determining whether harmless error had occurred. Specifically, the Ninth Circuit utilized Boyde's language and held that if "`there is a reasonable likelihood the jury applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence,' the error necessarily satisfies the Brecht test for substantial and injurious error." McDowell, 130 F.3d at 838 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

However, a year later, the Supreme Court criticized the Ninth Circuit's utilization of Bo de for this purpose.

> The Boyde test that the Court of Appeals applied instead is not a harmless-error test at a-ll. It is, rather, the test for determining, in the first instance whether constitutional error occurred when the jury was given an ambiguous instruction that it might have

> interpreted to prevent consideration of constitutionally relevant evidence.
>
> . . . .
>
> Although the Boyde test for constitutional error, like the Brecht harmless-error test, furthers the `strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation' . . . it is not a substitute for the Brecht harmless-error test.

Calderon v. Coleman, 119 S.Ct. 500, 503 (1998) (emphasis added).

On de novo review this court does not reach the same conclusion as the :magistrate judge. Because of the numerous references to the correct sentencing choices throughout the trial, the error, evaluated as but a part of the whole, does not transcend all that came before it. It simply did not have a substantial or injurious effect or influence on the jury's death verdict in the manner espoused by the magistrate judge. The record, viewed in totality, does not allow such a conclusion.[5/]

B. Remainder of claims (August 4, 1998 findings)

---

5. Petitioner himself concurs in this assessment. In a letter written to the magistrate judge after receipt of the March 3, 1998 findings, petitioner implores him to withdraw his recommendation on the jury instruction claim. "I feel that you should know that from the start of my jury selection the jury was told that should I be found guilty of murder and the special circumstances [sic] was found to be true, that they could only come back with either a sentence of Death or Life-without-the possibility of parole. They knew their choices! and they came back with a sentence of Death! They knew that there was an error in the instructions! and the judge was tired of stating the same thing over and over again! I never counted the number of times they were instructed with regards to the sentence! The judge did however want them to be clear of the out come [sic]." Letter dated July 22, 1998, attached to Doc. No. 142.

Although the magistrate judge mentions petitioner's letter, he elects not to consider it. Neither will this court. Nonetheless, it will be acknowledged as a fitting conclusion to the court's ruling on this claim.

The court has conducted an exhaustive de novo review and finds the magistrate judge's August 4, 1998 findings to be supported by the record and by proper analysis. Accordingly, the court adopts the August 4, 1998 findings and recommendations, denying petitioner's remaining claims.

C. Chapter 154's applicability (November 12, 1998 supplemental findings and order)

Based on the foregoing, it is unnecessary to resolve the applicability of Chapter 154 of the AEDPA. Even under pre-AEDPA standards where less deference is accorded the state supreme court's review on direct appeal, the writ must be DENIED.

SUMMARY

1. Respondent's motion for summary judgment is GRANTED.

2. The petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: June 3 ,1999

s/ EDWARD J. GARCIA
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

United States District Court for the
Eastern District of California
June 4, 1999

* * CERTIFICATE OF SERVICE * *
2:92-cv-00483

Morris

v.

Vasquez

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 4, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the persons) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Michael G Millman
California Appellate Project
One Ecker Place
Suite 400
San Francisco, CA 94105-2752

LCS/EJG

VC/GGH

Marianne D Bachers
Law Offices of Marianne D Bachers
312 Montcalm Avenue
San Francisco, CA 94110

Arthur Ruthenbeck
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814

Tony Tamburello
Tamburello Hanlon and Waggener
214 Duboce Avenue
San Francisco, CA 94103

FILED
MAY 27 1997
CLERK, U.S DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS,

Petitioner,

vs.

ARTHUR CALDERON,

Respondent.

/

No. CIV S-92-0483
EJG GGH P
FINDINGS AND
RECOMMENDATIONS

DEATH PENALTY CASE

I. Introduction and Summary

Respondent's motion for summary judgment, filed May 15, 1996, came on for hearing March 12, 1997, before the undersigned.[1/] Tony Tamburrello and Marianne Bachers appeared for petitioner. Ward Campbell appeared for respondent.

In the summary judgment motion, respondent argues that all of the claims raised in petitioner's second petition for writ of habeas filed in the California Supreme Court are procedurally barred in the instant action. Respondent also argues that several other claims raised in petitioner's state

---

1. Respondent filed the summary judgment motion on May 15, 1996. Pursuant to the January 11, 1996, scheduling order, petitioner's opposition was due sixty days thereafter. On August 8, 1996, the court granted petitioner's request for an extension of time to August 15, 1996, to file the opposition. At a hearing held September 12, 1996, the court granted petitioner until September 26, 1996, to file the opposition. On November 8, 1996, the court ordered petitioner's counsel to show cause for the failure to file an opposition. On November 19, 1996, petitioner filed the opposition.

appeal are procedurally barred because the California Supreme Court rejected them because of petitioner's failure to object at trial. Respondent also argues that several claims are not exhausted. In these findings and recommendations, the court will address these threshold arguments. The court will issue separate findings and recommendations addressing respondent's arguments going to the substantive merits of petitioner's claims.

The most difficult issue herein is that issue dealing with the timeliness bar asserted as to numerous claims. This court reconfirms its previous opinions, affirmed by the Ninth Circuit,[2/] which hold that if an alleged default commenced prior to the California Supreme Court's decision in In re Clark, 5 Cal.4th 750, 21 Cal.Rptr. 2d 509 (1993), the stated timeliness bar is insufficient for purposes of a federal finding of procedural default.[3/] However, a separate and distinguishable default occurred *post-Clark*--petitioner's two year delay in seeking to exhaust claims that this court had ordered exhausted. This court now finds that this post-Clark procedural default precludes adjudication on the merits of specified "timeliness" defaulted claims in this federal habeas action.

The court also finds that the procedural default based on grounds other than timeliness should be found in part and denied in part. Finally, petitioner's belated attempt to bring new claims in his post-exhaustion petition, which were never presented to the California Supreme Court, requires that the new claims be stricken.

II. Background

On June 22, 1987, a jury convicted petitioner of the murder of Rickey Van Zandt. Petitioner was sentenced to death for this murder. On March 28, 1991, the California Supreme Court affirmed petitioner's conviction on appeal, and

---

2. Calderon v. U.S.D.C. E.D. Cal. (Bean), 96 F.3d 1126 (9th Cir. 1996); Calderon v. U.S.D.C. E.D. Cal. (Hayes), 103 F.3d 72 (9th Cir. 1996).

3. The court will use the terms "procedural default" and "procedural bar" interchangeably.

denied a petition for rehearing. People v. Morris, 53 Cal.3d 152 (1991). Justices Mosk and Broussard filed separate opinions dissenting from the affirmance of the guilt and penalty judgments. On November 12, 1991, the United States Supreme Court denied petitioner's petition for writ of certiorari. Morris v. California, 502 U.S. 959, 112 S.Ct. 421 (1991).

On September 7, 1990, the first state petition for writ of habeas corpus was filed on petitioner's behalf in the California Supreme Court. The California Supreme Court denied the petition on the merits and without comment on December 13, 1990.[4/]

On March 27, 1992, petitioner filed a petition for writ of habeas corpus in this court. On August 12, 1992, counsel was appointed to represent petitioner. On June 15, 1993, an amended petition for writ of habeas corpus was filed. On December 6, 1993, the court issued an order staying the case to allow petitioner to exhaust his state remedies.

On December 1, 1995, petitioner filed a second petition for writ of habeas corpus in the California Supreme Court. On December 6, 1995, the California Supreme Court denied the petition on the merits and, alternatively, on the procedural ground that the petition was successive and delayed. The order stated as follows (see order denying petition lodged in this court on May 20, 1996):

> The petition for writ of habeas corpus, filed December 1, 1995, is denied. All claims are based on information that was long known or should have been known to petitioner or his counsel and could have been raised in petitioner's earlier habeas corpus petition; petitioner fails to allege with particularity any fact not earlier known to petitioner. No sufficient justification has been offered to explain the delay or the successive petition, and no fundamental miscarriage of justice has been demonstrated to

---

4. The issues contained in the first state habeas petition are either not involved in the procedural default section herein, or were affirmatively barred for failure to object at trial on direct appeal.

excuse either. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, std. 1-1.2; In re Clark (1993) 5 Cal.4th 750, 767-782 [successive petition], 783-787 [delay], 797-98 [exceptions]. Accordingly, the petition is denied as untimely. It is also denied on the merits. (See Harris v. Reed (1989) 489 U.S. 255, 264, fn. 10.)

On January 17, 1996, petitioner filed a first amended petition for writ of habeas corpus in this court.

Because it is an affirmative defense and because respondents move for dismissal, respondents bear the burden of establishing that California's procedural default rules are adequate to bar federal review. Karis v. Vasquez, 828 F.Supp. 1449, 1463 n. 21 (E.D.Cal. 1993). However, in the event the procedural default is otherwise properly applied, petitioner has the burden to demonstrate cause/prejudice or a miscarriage of justice if the bar is finally to be avoided.

III. Procedural Default

A. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims; procedural bar will not be applied "unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. at 263, 109 S.Ct. at 1043 (citations omitted). Federal questions should be reached only when it "'fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases

where a federal court has good reason to question whether there is an independent and adequate state ground for that decision.'" Coleman at 735, 111 S.Ct. at 2556.

To be independent of federal law, a state procedural practice must not "depend upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

However, as long as the state court has identified as an alternative ground for denying a claim, an independent and adequate state ground, it is of no dispositive significance that the state court reached the merits also. Harris v. Reed, 489 U.S. at 264 (n.10), 109 S.Ct. at 1044.

If the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. at 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'"

McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991) (quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645.

In order to establish a "fundamental miscarriage of justice" a petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 115 S.Ct. 851, 867 (1995), quoting Murray v. Carrier, 477 U.S. at 496, 106 S.Ct. at 2649-2650. "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup, 115 S.Ct. at 867. This standard is intended to focus the inquiry on actual innocence. Id. In a claim challenging actual innocence of the death penalty, the petitioner must show that it is more likely than not that no reasonable juror would have found petitioner eligible for the death penalty. Id. at 865.

B. Procedural Default: Second State Habeas Petition (Timeliness)

1. Claims at Issue

As stated above, in the portion of the motion setting forth the procedural default standards, respondent generally asserts that all claims raised in the second habeas petition are procedurally defaulted because they were not timely raised. However, clearly not every claim is procedurally defaulted as some of these claims were raised in earlier state proceedings and denied on the merits. As the undersigned has stated on several occasions, a petitioner cannot be punished in federal court for "exhausting too much" in state court. While the state court can certainly bar its review of a successive claim, any claim that had been timely presented in an earlier state appeal/petition, and whose merits were ruled upon at that time

by the state supreme court are correctly presented in a federal petition regardless of later actions by the state supreme court on the same claim.

In the portion of the motion addressing the claims individually, respondent later identifies four specific claims raised in the second amended petition which he alleges were not timely raised: VIII, XVII, XXXVII and XXXVIII. However, some of these claims contain several elements, not all of which respondent appears to argue were procedurally defaulted. Accordingly, the court will now set forth the specific portions of these claims which respondent argues are procedurally defaulted.

Claim VIII alleges that prejudicial evidence that the trial court had excluded was admitted at trial in violation of due process. In particular, petitioner claims that the prosecutor introduced evidence of petitioner's taped statement to Nebraska authorities, which the trial court had ruled inadmissible. The judge then admonished the jury. Claim VIII contains the following subparts: 1) the treatment of this issue by the state supreme court amounts to a denial of due process because the supreme court improperly altered the theories upon which the admissibility of the evidence at trial was adjudicated; 2) the admission of this evidence deprived petitioner of a fair trial in violation of due process; 3) trial counsel was ineffective in failing to ensure that this evidence was not admitted. It appears that respondent is now arguing that the first element, i.e. altering of theories of admissibility by the California Supreme Court, is procedurally defaulted. See Summary Judgment Motion, p. 85:1-16.

Claim XVII alleges that petitioner was deprived of his right to a unanimous jury determination on whether he premeditated and deliberated the homicide. This claim contains no subparts. Therefore, respondent's procedural default argument is directed to the entire claim.

Claim XXXVII alleges the ineffective assistance of trial and appellate counsel. In particular, petitioner alleges the following individual claims of ineffective assistance of trial counsel:

A. Counsel failed to challenge for cause jurors whose bias was unquestionably shown and to exercise peremptory challenges against these jurors.

B. Counsel failed to investigate evidence concerning petitioner's background and upbringing and present it at both phases of his capital trial.

C. Counsel failed to investigate and present background evidence concerning Avette Barrett and Allison Eckstrom.

D. Counsel failed to investigate and present background evidence concerning jailhouse informants Wharton, Weaver and Anthony Brooks.

E. Counsel failed to investigate and present background evidence concerning Ricky Van Zandt.

F. Counsel failed to investigate and challenge the forensic evidence the prosecution presented at trial by consulting with appropriate defense experts and challenging the conclusions at trial of the forensic experts.

G. Counsel failed to investigate and present additional available mental state evidence at both phases of petitioner's capital trial despite receiving early and repeated indications of petitioner's lengthy history of organic brain damage, losses of consciousness and familial history.

H. Counsel failed to adequately investigate petitioner's competency to stand trial and to aid and assist in his defense at trial and on appeal. Counsel failed to seek a hearing on petitioner's competency.

I. Counsel failed to investigate the effect of petitioner's drug use on his mental state at the time of the alleged homicide.

J. Counsel Shattuck's failing health materially interfered with his ability to zealously defend petitioner.

K. Counsel did not investigate the constitutional validity of petitioner's prior convictions and nonetheless stipulated to their admissibility.

L. Counsel failed to object to the admissibility of excludable evidence, to seek the admission of favorable evidence, to consult with necessary and appropriate experts, and to formulate and submit appropriate instructions at both phases of trial.

M. Counsel's failure to investigate or present additional available mental state and other mitigation evidence at penalty phase deprived petitioner of mitigating evidence that would have provided the jury with strong mitigating factors on which to base a life verdict.

N. Counsel failed to uncover and challenge the conflicts of interest suffered by the Sierra County District Attorney's Office, which gave immunity to Barrett and Eckstrom, and to seek its removal as the prosecuting agency.

O. Counsel failed to investigate the capital charging policies of the Sierra County District Attorney's Office and to discover that those policies were arbitrary and capricious and violated constitutional standards.

Finally, petitioner alleges that appellate counsel was ineffective for failing to investigate and present evidence of the matters listed above. (Para.P.)

After reviewing the record, it appears that respondent is arguing that all of the ineffective assistance of counsel claims listed above are defaulted.

In Claim XXXVIII, petitioner argues that his constitutional rights were violated because he was tried and had his automatic appeal denied while he was incompetent to aid and assist in his defense. Petitioner also argues that he was incompetent to waive his various
constitutional rights. It appears that respondent is claiming that this entire claim is procedurally defaulted.

Accordingly, having determined which particular claims raised in the second state habeas petition respondent is specifically claiming are procedurally barred, the court turns to

its analysis.

2. Analysis

Respondent generally argues that the four claims listed above are procedurally barred because of petitioner's failure to timely raise them. See Motion for Summary Judgment, p. 29:20-23. Respondent's argument rests primarily on the California Supreme Court's citation to In re Clark in its order denying the second habeas petition. Respondent's argument implicates two separate claims for procedural default based on the failure to timely raise these claims: 1) failure to raise these claims in the first habeas petition (pre-Clark), and 2) failure to timely exhaust these claims following this court's stay of this action on December 6, 1993 (post-Clark) . The court will first address whether the failure to raise these claims in the first state habeas petition constitutes an adequate procedural bar.

Pre-Clark Default: Failure to Raise Claims in First State Habeas Petition

The California Supreme Court, citing In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993), and California Death Penalty Standard 1-1.2, denied the second habeas petition on procedural grounds. A brief review of the history of the California courts' timeliness bar is instructive in determining this basis for the court's ruling. The California courts have generally disfavored unduly delayed petitions. See, e.g., People v. Jackson, 10 Cal.3d 265, 110 Cal.Rptr. 142 (1973); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633 (1970). However, the early cases provided little guidance as to just what constituted undue delay or what would excuse a finding of undue delay. In re Stankewitz, 40 Cal.3d 391, 396-97 n. 1, 220 Cal.Rptr. 302 (1986), held that a petitioner must "point to particular circumstances sufficient to justify substantial delay." However, the court did not define how much delay was "substantial."

In 1989, the California Supreme Court established

standards, including timeliness standards, for filing habeas corpus petitions in capital cases. The standards, officially called Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Case, *in effect at the time of petitioner's first habeas petition* (1990) are set forth in Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996):

1. Timeliness Standards

1-2. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of In re Stankewitz (1985) 40 Cal.3d 391, 396-397 fn. 1, 220 Cal.Rptr. 382, 708 P.2d 1260), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-2. Any petition that fails to comply with these requirements may be denied as untimely.

In 1993, the California Supreme Court further clarified its timeliness rules and set forth specific exceptions to the timeliness bar. In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). The court reviewed the state procedural limitations applicable to petitions for habeas corpus, including the rules applicable to delayed petitions, repeated petitions, and piecemeal presentation of claims. In describing prior state practice limiting habeas corpus relief, the court stated: "because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted." Id. at 763.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim should have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the claim should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

The California Supreme Court cited Clark in the instant case as a bar to petitioner's second habeas petition. In doing so, the Court retroactively applied Clark because, by

definition, the timeliness bar means petitioner should have raised the claims earlier. The problem is that, although petitioner filed the second state petition at issue in this case after Clark, the time at which petitioner should have raised the claims, i.e., when he filed his first habeas petition, Clark was not the law. The question then is whether the federal court should respect the state court's retroactive application of its Clark timeliness rules to bar consideration of petitioner's claims.

The Ninth Circuit, in an opinion that is difficult to decipher in terms of the precise procedural bars being addressed, held:

> The California Supreme Court has recently held that the procedural bars that state relied upon are discretionary, and have not been applied consistently. [citing In re Clark.]

Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

Nowhere in the entire opinion did the Ninth Circuit specify precisely what procedural bars the state had expressly relied upon in its brief, and the order of the California Supreme Court was completely non-explanatory in this respect. One is left to divining what procedural bars the Ninth Circuit perceived as having been raised by the state in its briefs (and ruled upon by the California Supreme Court) in its later discussion of "subsequent," "successive" and "piecemeal" petitions. Siripongs held that its piecemeal petition was not procedurally barred. Clark itself discussed piecemeal, successive and delayed (untimely) petitions. However, even respondent concedes that the state supreme court itself was attempting to clear up inconsistencies of procedural bar application: "Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious [successive] petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice." In re Clark, 5 Cal.4th at 768, 21 Cal.Rptr.2d at 520.

Respondent notes, however, that Clark made a different statement for its delay (untimeliness) rules--and

respondent is correct. "Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim." In re Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530. The problem with respondent's (and Clark's) pronouncements is that in the circumstances of this case, and Siripongs as well, there is absolutely no meaningful distinction between claims brought in a "piecemeal" fashion and claims brought with undue "delay"--a claim brought in a piecemeal fashion is a delayed claim and vice versa.

In two other death penalty cases, relying on the Ninth Circuit authority, this court has previously found that California law was not sufficiently, consistently applied in the past (pre-Clark) with respect to untimely petitions. Bean v. Calderon, CIV S-90-0648 EJG GGH P, aff'd., 96 F.3d 1126 (9th Cir. 1996); Hayes v. Vasquez, CIV S-92-0603 DFL GGH P, aff'd., 103 F.3d 72 (9th Cir. 1996). In both Bean and Hayes, the first state habeas petitions were filed not only pre-Clark but also prior to the enactment in 1989 of the California death penalty standards discussed above. In the instant case, although the first state habeas petition was filed pre-Clark, it was filed after enactment of the 1989 policies. Consistent with this court's orders in Bean and Hayes, this court finds that the citation to Clark does not establish a procedural bar in the instant case insofar as the "default" occurred prior to Clark. However, this court will consider whether the citation to standard 1-1.2 is a separate procedural bar.

As discussed above, the California Supreme Court cited standard 1-1.2 which, at that time, provided that a petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware of the legal basis for the claim. In applying this specific standard, the California Supreme Court implicitly found that petitioner had not shown with specificity facts showing that the petition was filed within a reasonable time after petitioner and/or counsel became aware

of the relevant facts. In other words, the California Supreme Court cited standard 1.1-2 for the proposition that the second petition was not timely.

In Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), the Ninth Circuit addressed these standards. In that case, the petitioner filed his first state habeas corpus petition on December 16, 1992. The California Supreme Court denied the petition as untimely, citing standards 1-1.1 to 1-3 and In re Stankewitz (1985) 40 Cal.3d 391, 396 fn. 1, 220 Cal.Rptr. 382, 708 P.2d 1260. Morales, 85 F.3d at 1389. The district court found that the procedural bars invoked were adequate and independent state grounds that supported the Supreme Court judgment. Morales, 85 F.3d at 1389. The Ninth Circuit reversed the district court, finding that California's rule on timeliness was not "clear, consistently applied and well-established" at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. Morales, 85 F.3d at 1393.

In reaching this holding, the Ninth Circuit stated,

> We find it difficult to articulate California's timeliness requirements as they applied to Morales. The Standards make it clear enough that a petition for habeas corpus is presumed timely if filed within 60 (later 90) days of the final due date of the petitioner's reply brief on direct appeal, Standards § 1-1.2, but Morales's appeal had already been decided at the time the Standards were announced. Neither the Standards themselves nor California cases construing those Standards create an unambiguous rule on timeliness beyond the 60 or 90 days.
>
> **********
>
> We find so much variation in application of California's timeliness requirements before Clark that we conclude that no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal.

Morales, 85 F.3d at 1390, 1391.

In Deere v. Calderon, 890 F.Supp. 893, 899 (C.D.Cal. 1995), the district court for the Central District of California also found that the California Supreme Court "gave little shape to these standards until it issued a lengthy habeas decision in In re Clark."

This court is persuaded by the strong dicta of the Ninth Circuit in Morales and Deere regarding the inconsistent application of these standards prior to Clark. For the reasons discussed above, this court finds that petitioner's failure to raise the claims set forth above in his first state habeas corpus petition does not constitute an adequate procedural bar.

Post-Clark Default: Belated Filing of Second State Habeas Petition

As discussed above, on December 6, 1993, this court issued an order staying this case to allow petitioner to exhaust state court remedies. On December 1, 1995, approximately two years later, petitioner filed his second petition for writ of habeas corpus in the California Supreme Court. On December 6, 1995, the California Supreme Court denied this petition on procedural grounds and on the merits.

At the time the federal action was stayed and petitioner was directed to return to state court and exhaust state court remedies, i.e. December 1993, Clark was the law. Clark was decided July 29, 1993. Petitioner waited two years before filing the exhaustion petition. The issue is whether the citation to Clark is an adequate procedural bar to the issues raised in an exhaustion petition filed post-Clark.

Petitioner argues that Clark has no relevancy to what he did following December 1993 because the time he should have raised the claims at issue was when he filed his first state habeas petition in 1990. In essence, petitioner is arguing that because his first state habeas petition was filed prior to Clark, there was no time limit for the filing of his exhaustion petition. Common sense, and the court's order of February 9, 1994 (see below), dictate that this cannot be the law.

The whole import of Clark is that, although the timeliness standards for filing state habeas petitions may have been unclear in terms of what was substantial delay and what situations might excuse the delay prior to Clark, counsel were, by the Clark decision, then put on notice that the opaque had become crystal clear. Commencing with the Clark decision (July 29, 1993), any unreasonable delay occurring after Clark would be subject to the clear and unambiguous rules set forth therein.

Although respondent has the burden of establishing that Clark has been regularly followed, that burden is easily met. No one expects that respondent must depose the justices of the California Supreme Court, or that discovery must be ordered to probe use of the citation in unpublished opinions.[5/] Rather, respondent's burden is met by examining the clarity of Clark itself, and its subsequent use in reported opinions. See, Younan v. Caruso, 51Cal. App.4th 401, 411, 59 Cal. Rptr.2d 103, 109 (1996); People v. Senior, 33 Cal.App.4th 531, 538, 41 Cal.Rptr.2d 1, 5 (1995); In re Birdwell, 50 Cal.App.4th 926, 929, 58 Cal.Rptr.2d 244, 246 (1996) (exception applied--sentence given in excess of court's jurisdiction). The court finds no evidence that Clark is not regularly followed by the California courts.

Before reaching petitioner's contentions of "cause for the delayed filing," it is first necessary to dispel petitioner's contentions that he is being treated unfairly in comparison to the petitioner in Bean because that petitioner (Bean) also delayed filing his state petition on exhaustion--yet this same court did not find petitioner in Bean to have defaulted post-Clark. See, Petitioner's April 25, 1997, briefing.

---

5. Anyone involved in adjudicating numerous 28 U.S.C. § 2254 habeas cases in California at the district court level is very familiar with the frequency of Clark procedural bar citations and motions to dismiss brought by the Attorney General. Moreover, by reference to the Clark citations in Siripongs, Morales, Bean, and Hayes, one can see that the California Supreme Court pronounces procedural default based on Clark quite regularly.

Court records indicate that on September 26, 1991, this court ordered the Bean case stayed so that petitioner could return to state court and exhaust state court remedies.[6] On October 31, 1991, counsel was appointed by the California Supreme Court to represent petitioner Bean. On October 15, 1992, the California Supreme Court denied petitioner Bean's request for funds. On May 26, 1994, petitioner Bean filed his state habeas corpus petition.

In Bean, it is true that approximately three years lapsed between the time this court ordered the petitioner to return to state court and exhaust his remedies and the time the petitioner filed his exhaustion petition. However, this court ordered petitioner to exhaust pre-Clark. Such a fact makes all the difference. Assuming the issue had been brought to the court's attention, this court would have had to find as a factual matter in Bean that the delay in filing the petition on exhaustion therein *commenced prior* to Clark--indeed, no matter when any particular delay commenced in Bean, every delay commenced prior to Clark. This court could not have logically held in Bean that some delays commencing pre-Clark were not sufficient for a procedural bar, and others commencing pre-Clark nevertheless occasioned the bar. This is the first case assigned to the undersigned in which the default at issue *commenced post*-Clark. Therefore, this court is not bound by its earlier evaluation of Bean.

Having found that petitioner herein has defaulted the claims from the second state habeas petition, the court turns to whether he has demonstrated cause and prejudice for the default or a fundamental miscarriage of justice.

On April 7, 1997, this court issued an order directing petitioner to file briefing addressing the reasons for the two year delay between the time this action was stayed and the time he filed his exhaustion petition in state court. On April 25, 1997, petitioner filed a response to the April 7, 1997, order. Petitioner

---

6. Judicial notice may be taken of court records. Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D.Cal. 1978), aff'd, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126 (1981).

states that counsel could not immediately file an exhaustion petition without conducting further investigation, as counsel had not represented petitioner during the earlier state proceedings. Petitioner states that counsel requested funds from the state supreme court on two occasions. The state court gave counsel $1,450 for investigation, although counsel had sought $35,000. Counsel determined it would be futile to immediately seek funds from the state court without developing more facts in support of a funds request. Petitioner filed the exhaustion petition approximately 13 months after the state court denied the request for funds for investigation and assistance.

The court cannot find that petitioner has demonstrated cause for this default. Petitioner claims that the denial of funding by the California Supreme Court caused petitioner to have to conduct additional investigation before filing the exhaustion petition, and that petitioner's counsel was not as familiar with the case having not represented petitioner during earlier state proceedings. The argument is obfuscatory and specious. This court observes that all of the claims specifically identified as defaulted in the second state habeas petition (filed December 1995)were raised, virtually *word for word*, in the pre-exhaustion federal petition filed January 15, 1993. Moreover, petitioner "investigated" the claims in the 1993 federal petition for nearly one and one-half years before filing the pre-exhaustion federal petition. Although this court discouraged full funding of expert investigation fees at the time, counsel were given $93,725.00 in attorneys' fees for purposes of investigation and preparation of the initial petition along with $1,202.92 in expense reimbursement during the time period from appointment to order of exhaustion (7/30/92-12/19/93). Moreover, the vast majority of claims and subclaims under scrutiny for procedural default involved no possible expert testimony. Counsel was expressly told that if she needed investigative monies to *state a claim*, as opposed to finally prove it, this court would consider such a request. Order, April 2, 1993 at 2-4. No such request was made. Yet petitioner states that he needed even more "investigative" time when taking the federally stated claims over to state court. This cannot be.

And, when petitioner applied for and was refused funds in state court, one year after this court ordered exhaustion, it *still* took petitioner a year to file the exhaustion petition for claims that had *already* been satisfactorily stated in federal court two years earlier.

In addition, *petitioner was expressly advised early after the court told petitioner to exhaust that this court would not extend any time in which to file a state habeas petition, and the court expressly advised petitioner he might be prejudiced if he delayed in filing a state habeas petition on exhaustion.* Order. Feb. 9, 1994. Despite this warning, the exhaustion petition was finally filed two years after this court ordered exhaustion only because respondent filed for, or was going to file for, an execution date.

The claims (presently at issue) raised in the exhaustion petition are virtually identical to those raised in the first federal habeas corpus petition. Under these circumstances, there is no legitimate reason why petitioner could not have simply filed the exhaustion petition immediately following this court's order staying federal proceedings. Petitioner's counsel has not demonstrated good cause for this delay. For that reason, there is no need to examine whether petitioner has demonstrated prejudice.

Turning to the issue of whether a fundamental miscarriage of justice exists, petitioner must demonstrate actual innocence. Murray v. Carrier, 477 U.S. at 490, 106 S.Ct. at 2626. The California Supreme Court summarized the case against petitioner as follows:

> The body of Rickey Van Zandt was found facedown at the bottom of a hill by Sierra County law enforcement officers. His skull was crushed; he had been beaten to death. Defendant admitted on several occasions before and after his arrest that he had hit Van Zandt over the head at least 13 times with a rock and a stick in order to steal his van. After striking the fatal blows, defendant left the scene in the van with his two female companions and drove out of the state, where he was apprehended. At his trial, defendant

> repudiated his numerous admissions of guilt and blamed his companions for Van Zandt's murder. The jury rejected his testimony and found him guilty. After it heard penalty phase evidence that focused on defendant's prior offenses of attempted rape and kidnaping, it returned a verdict of death.

Morris, 53 Cal.3d at 175-76.

As stated above, petitioner testified on his own behalf and denied killing Van Zandt. He testified that Van Zandt was killed by his female companions, Avette Barrett and Allison Eckstrom, after Van Zandt tried to rape Barrett. Morris, 53 Cal.3d at 178. Petitioner testified that Van Zandt returned to the van while petitioner was still fishing. Id. When petitioner later returned, he found Eckstrom upset and Barrett crying. Id. Both women had blood on their dresses. Id. According to petitioner (at trial), Barrett explained that she had killed Van Zandt by hitting him with a rock when he had tried to rape her in the van. Id. Defendant then pulled Van Zandt, still alive, out of van. Id. Eckstrom hit him with a stick and mumbled that she had killed him. Id. The jury disbelieved petitioner.

Petitioner has offered no new evidence in support of his claim of actual innocence of the crime. Rather, he appears to rest his claim of innocence entirely on the record as presented at trial. At trial, petitioner argued that Barrett and Eckstrom had killed Van Zandt. In support of the instant claim of innocence, petitioner has offered no additional evidence to support this claim. For example, petitioner has not provided the court with affidavits from either Barrett or Eckstrom discussing their involvement in the killing. In establishing actual innocence of the crime, petitioner cannot rely solely on the instant record. Therefore, the claims relating to the *guilt phase* that the court has found defaulted do not implicate actual innocence. In ordering these claims dismissed for procedural default, no miscarriage of justice will occur.

In determining that petitioner has not demonstrated actual innocence for any guilt phase issue, the court has considered whether petitioner's ineffective assistance allegation--that his counsel was ineffective for not developing

the "fact" that petitioner did not form the requisite intent to kill or for the special circumstance of felony murder (here the intent to rob) because of mental infirmity--is an allegation of "actual innocence." That is, assuming that a defendant was the causative factor in the killing, but that he now alleges that he did not possess the intent required for the crime of conviction on account of mental illness, is that defendant claiming "actual innocence" of the crime of conviction--even though he may be guilty of some lesser crime. While the Ninth Circuit has not opined on the subject to the undersigned's knowledge, the court will assume that such an allegation implicates actual innocence in the strictest sense. See Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995); but see Bannister v. Delo, 100 F.3d 610, 616-617 (8th Cir. 1996). However, petitioner is not entitled to an evidentiary hearing or discovery to demonstrate the purported actual innocence which would remove the procedural default.

> Bannister also incorrectly asserts that an evidentiary hearing was required so that he could develop evidence in support of his claim of actual innocence. In Battle, 64 F.3d at 353, we rejected the argument that an evidentiary hearing was necessary to enable the petitioner to develop evidence "which, he claim[ed], w[ould] exonerate him." Noting that "[i]n essence, [petitioner] [wa]s asking us to excuse his evidentiary default as to his claim of actual innocence, ... in order that he may develop sufficient evidence of his actual innocence[,]" we found "[t]his circular argument [wa]s without merit." Id. at 354. We explained: a remand is inappropriate because the actual innocence gateway through a procedural bar is not intended to provide a petitioner with a new trial, with all the attendant development of evidence, in hopes of a different result. Rather, it is an opportunity for a petitioner, aggrieved by an allegedly defective trial and having inexcusably defaulted the available remedies, to raise such a strong doubt to his guilt that, in hindsight, we cannot have confidence in the trial's outcome unless it was

> indeed free of harmless error. To avail himself of that opportunity, it is the petitioner's, not the court's, burden to support his allegations of actual innocence by presenting new reliable evidence of his innocence.

Bannister v. Delo, 100 F.3d at 616.

In the instant case, petitioner did not assert at trial that he had killed Van Zandt but that he did not have the capacity to form the required intent, nor did he allege that he actually lacked the intent to kill and/or rob his victim. Rather, he claimed that his co-travelers committed the murder when he was absent. Now, petitioner, having been unsuccessful with this alibi defense at trial, claims in this habeas proceeding (at least in part) that if he did actually kill Van Zandt, he lacked the requisite intent to kill or rob. And, of course, petitioner wants a full fledged trial to prove this latter day contention without presenting any evidence of such at the present time. The strict actual innocence exception to procedural default is not to be construed as the means by which the procedural default rule itself is rendered meaningless by the mere invocation of its exception. A claim of actual innocence does not automatically mandate a trial on the very issue defaulted.

However, the court will defer determination of "actual innocence" as it applies to the penalty phase. The court desires to make this determination when it has a better grasp of what that term means as applied to the penalty phase. Claims of "actual innocence" for purposes of assessing a miscarriage of justice at the penalty phase are more problematically determined at this juncture. Previous Supreme Court cases have held, in the habeas context of procedural default, that the "not guilty of the offense" concept, a.k.a. "actual innocence," requires that one be permitted to prove "actual innocence of the death penalty" for assertions of error at a penalty phase. Sawyer v. Whitley, 503 U.S. 333, 112 S.Ct. 2514 (1992). Indeed, actual innocence is defined in Sawyer as "petitioner has shown by clear and convincing evidence that but for constitutional error no reasonable juror would find him eligible for the death penalty under Louisiana law." Sawyer, Id. at

348.[7] With respect to subclaims--B, G, and M of Claim XXXVII, the court will defer the ultimate miscarriage of justice ruling pending further review of investigative requests and the merits briefing.

The court makes the same deferral ruling with respect to claims that petitioner was not competent to stand trial. Subclaim H of XXXVII, and Claim XXXVIII. The application of "actual innocence" to competency claims requires further analysis.

Therefore, in summary: Claims VIII (altering theories of admissibility), XVII, and XXXVII (A, C, D, E, F, I, J, K, L, N, O, P) should be finally procedurally defaulted; Claims XXXVII (B, G, H, M), and XXXVIII should be procedurally defaulted pending a final determination of the miscarriage of justice exception to the procedural default doctrine.

C. Individual Claims Found Defaulted in Appeal, i.e., For Reasons Other Than Timeliness

Respondent argues that several individual claims raised in petitioner's direct appeal are procedurally defaulted. Petitioner did not address these claims in the opposition to the motion to dismiss. The court will address these claims individually. At the conclusion of the discussion, the court will address whether petitioner has shown cause and prejudice or a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. at 1043.

Claim III of the Amended Petition challenges the admission of evidence regarding petitioner's escape plot. This claim has two components. First, petitioner alleges violations of the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted the testimony of a jailhouse informant,

---

7. With appropriate word changes, the Supreme Court has utilized the same definition as the Act for "actual innocence" in the liability phase. Sawyer, 112 S.Ct. at 2519 (fn.5). In other words, although it may not be practically true, the Supreme Court has equated actual innocence with being found not guilty.

Anthony Brooks, that petitioner had planned to escape from jail while awaiting his trial. Second, petitioner alleges that the prosecution failed to disclose consideration Brooks received for his testimony.

Respondent argues that the first component of the claim, i.e. the challenge to admission of the testimony, is procedurally barred because the California Supreme Court held that petitioner had waived[8] this contention on appeal by failing to object at trial. The California Supreme Court rejected this claim on the merits and on procedural grounds:

> At trial defendant moved to exclude Brooks's testimony, asserting that jailhouse informants are unreliable witnesses. The trial court held a pretrial hearing on the motion, but made no ruling. Defendant failed to request a ruling and made no objection when Brook's testimony was offered. As a result of these events, defendant has waived any claim of error in the introduction of Brooks's testimony for two reasons. First, defendant failed to object to the escape evidence when it was offered. (People v. Rodgers (1976) 54 Cal.App.3d 508, 517 [126 Cal.Rptr. 719].) In contrast to the immunity agreement issue (see pt. VII, ante), the trial court never made a ruling on Brooks's testimony. Defendant was obligated to press for such a ruling and to object to Brooks's testimony until he obtained one. He failed to do so, thus depriving the trial court of the opportunity to correct potential error. Second, defendant failed to advance in the trial court the specific ground for exclusion he now urges. Defendant's motion is directed to the alleged unreliability of jailhouse informants, not to any

---

8. A recent Ninth Circuit case has distinguished "waiver" of a claim from "forfeiture," and perhaps "forfeiture" is the correct term. United States v. Magallou, __F.3d.__, 1997 WL 219504 (9th Cir. 1997). However, the term "waiver" is so commonly used, this court will continue with such terminology.

> inherent ambiguity in escape-attempt evidence when multiple crimes are charged. The motion was therefore not sufficiently specific to preserve the alleged error. (Evid. Code, § 353; People v. Coleman, supra, 46 Cal.3d at p. 777; People v. Ghent, supra, 43 Cal.3d at p. 766.) Because of defendant's procedural omissions, the trial court had no fair opportunity to consider excluding this evidence. Therefore, defendant cannot challenge its ruling on appeal.
>
> We also reject the claim on the merits...

People v. Morris, 53 Cal.3d 152, 195-196 (1991).

The California Supreme Court denied this claim on a procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991). That the California Supreme Court reached the merits of the claim is of no dispositive significance. Harris v. Reed, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 1044 (1989). Therefore, this claim is procedurally barred.

Respondent next argues that claim IX (improper admission of letter from petitioner to Avette Barrett) is procedurally barred. In this claim, petitioner alleges that while he was detained pending trial, he wrote a letter to Avette Barrett. The letter contained damaging admissions, i.e., that petitioner had "killed" for her. He claims that the letter was improperly admitted at trial on several grounds: 1) its admission violated the Best Evidence Rule; 2) admission of the letter was more prejudicial than probative; 3) admission of the letter deprived him of the ability to confront and cross-examine a crucial witness; 4) to the extent no objection was made to the introduction of this evidence, petitioner received ineffective assistance of counsel.

The California Supreme Court rejected petitioner's claim that admission of the letter violated the Best Evidence Rule because his attorney failed to object in the trial court to admission of the letter on this ground. Morris, 53 Cal.3d at 204, 299 Cal.Rptr. at 750. For that reason, the California Supreme Court found that petitioner had waived this objection

on appeal. Id. Similarly, the state supreme court held that any objection based on "undue prejudice" was waived. Id. at 205, 279 Cal.Rptr. at 750. Although the California Supreme Court did go on to address this objection on the merits, petitioner's claim regarding violation of the Best Evidence Rule is procedurally defaulted in the instant action.

The California Supreme Court also found that petitioner had challenged the admission of the document based on relevancy. Morris, 53 Cal.3d at 205. Therefore, the court will review the relevancy challenge on its merits in its later Findings and Recommendations. Moreover, the California Supreme Court has never procedurally barred the ineffective assistance of counsel claim directed to the alleged failure of trial counsel to object to the letter. This may well be because this ineffective assistance claim was separated from the main body of ineffective assistance claims (XXXVII). Nevertheless, unless the California Supreme Court has barred the claim, this court is without authority to impose its own determination of what the state supreme court might have done had it scrutinized the petition on exhaustion more closely. Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638 (1985).[9/] Accordingly, this court finds that petitioner's challenge to the admission of the letter on grounds that it violated the Best Evidence Rule and was more prejudicial than probative are procedurally barred, but not barred on relevancy or ineffective assistance grounds.

Respondent argues that Claim XI (challenge to admission of testimony of Rickey Van Zandt's mother) is procedurally barred. In this claim, petitioner alleges that the Fifth, Sixth, Eighth and Fourteenth Amendments were violated when the trial court permitted Rickey Van Zandt's mother to testify that she had given him permission to use the van petitioner was convicted of stealing, and to identify and

---

9. The court does pause to note its displeasure with petitioner's pleading practice of allying substantive claims with an ineffective assistance of counsel claim despite an "omnibus" ineffective assistance section. Petitioner sets up an unnecessarily complicated pleading.

introduce a photo of her son. The background of this claim is set forth in the opinion of the California Supreme Court:

> The prosecution called Lowelene Helms, the victim's mother, as its first witness. Before she testified, defendant objected to any attempt by the prosecution to ask her to identify the autopsy photos of her son's corpse, noting that the photos had already been ruled admissible. The trial court sustained the objection and precluded the testimony, noting the potentially inflammatory effect of such questioning. In an effort to preclude other testimony by Ms. Helms, defense counsel offered to stipulate that: 1) the victim was in lawful possession of the van; 2) he had his mother's consent to use it and her credit cards; and 3) she had given such permission to no one else. The prosecutor declined to accept the stipulation and the trial court refused to compel acceptance. Ms. Helms took the stand, testifying very briefly (her testimony occupies approximately five transcript pages) to matters included in the proffered stipulation as well as others.

Morris, 53 Cal.3d at 208, 279 Cal.Rptr. at 752.

In addressing the claim regarding the testimony of Van Zandt's mother, the California Supreme Court stated,

> Initially, there was no defense objection to several items in Ms. Helm's testimony that are now claimed to be inflammatory or prejudicial, e.g. 1) her reference to her husband's death from cancer and her loan of the van to her son so he could "get away"; and 2) her identification of photos of her son while alive. In the absence of an objection, defendant has waived any error in the admission of this evidence. (Evid. Code, § 353.)
>
> Although the court should have required a stipulation on routine evidence to avoid the prospect of prejudicial victim-impact testimony (see People v. Bonin (1989) 47 Cal.3d 808, 848-849 [254 Cal.Rptr. 298, 765 P.2d 460]; People v. Brown (1988) 45

> Cal.3d 1247, 1262 [248 Cal.Rptr. 817, 756 P.2d 204]), we find no reversible error from its failure to do so...

Morris, 53 Cal.3d at 208, 279 Cal.Rptr. at 752-753.

Petitioner's instant claim regarding the testimony of Ms. Helm's appears to contain two elements. First, petitioner argues that she should not have been permitted to testify regarding certain matters. Second, he claims that the trial judge improperly failed to require the stipulation. It is clear that the challenge to the testimony itself is defaulted based on counsel's failure to object. For that reason, this part of claim XI is procedurally barred. The challenge to the failure of the trial court to require the stipulation was addressed by the California Supreme Court on the merits. Therefore, it is not procedurally barred.[10/]

Next, respondent argues that claim XII is procedurally barred. In this claim, petitioner alleges that his constitutional rights were violated when the defense was required to disclose to local law enforcement authorities that they intended to call out of county jail inmates as witnesses on petitioner's behalf at trial.[11/]

The California Supreme Court rejected this claim:

> We need not reach the merits of defendant's argument because he has waived any alleged error. The record reveals that defendant made no request for a protective order or other relief that might have kept the identities of his witnesses confidential until they

---

10. This is one of the few claims for which petitioner did not textually state that counsel was ineffective for failing to object. The court does not recognize the pleading mantra utilized as a preamble for every claim--that the claimed error violated the Fifth, *Sixth*, Eighth and Fourteenth Amendments with no textual allegation--as fairly presenting an ineffective assistance claim either to this court or to the California Supreme Court.

11. In this claim, petitioner also alleges that the prosecutor improperly examined one of these inmates concerning protected speech and religious beliefs in an attempt to impeach her. Respondent does not challenge this part of claim XII as procedurally barred.

> were summoned to court. (See Millaud v. Superior Court (1986) 182 Cal.App.3d 471, 474 [227 Cal.Rptr. 222]; Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 205-207 [124 Cal.Rptr. 427].) Instead, defendant's first and only complaint about these witnesses was a motion to expedite their return to Sierra County because they were being "harassed" in the San Joaquin County jail. The declaration of defense counsel supporting that motion stated in part that the "witnesses have been cooperative and *at our request have talked to the prosecution*, after the prosecution independently identified who those witnesses were, apparently after a removal order was served on them..." (Italics added.) Having thus made no attempt to deny the prosecution access to his witnesses, defendant is in no position to complain that it interviewed them.
>
> Moreover, defendant supplies no evidence of any prejudice from the prosecution interviews.

Morris, 53 Cal.3d at 209, 279 Cal.Rptr. at 753.

In finding this claim defaulted, the California Supreme Court found that petitioner had failed to request a protective order or other relief. Unlike other grounds for finding a procedural bar, such as failing to object, this court is not so familiar with this specific ground. However, it appears that the state supreme court is applying to this specific situation a general "fail-to-ask-at-your-peril" waiver rule which is familiar to all lawyers.[12/] Moreover, although it is true that it is respondent's burden to demonstrate that a procedural practice is clearly defined, firmly established and regularly followed, when the portion of the California Supreme opinion cited by respondent indicates that the procedural practice is routinely followed, such as by the citation to supporting case authority,

---

12. For example, if one fails to ask a lower court to rule on an issue, the issue is quite often considered waived on appeal. Int. Union of Bricklayers etc v. Martin Jasks, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985).

this court finds that respondent has met its burden in identifying an adequate procedural bar. Under these circumstances, if the rule is not regularly and routinely followed, then petitioner has some burden to bring that to the court's attention.

As there is nothing in the record indicating that this practice is not regularly and routinely followed, the court finds that this claim is procedurally defaulted.

Respondent argues that portions of Claim XXIX are procedurally barred. In this claim, petitioner alleges that the prosecutor committed misconduct in examining defense mitigation witnesses and during his penalty phase closing argument. In particular, petitioner alleges the following misconduct. First, he claims that during cross-examination of Warden Wilson the prosecutor improperly inquired whether he had spoken to victims' families about the tragedies they suffered. The prosecutor also asked the Warden about the murder rate in prison and about instances of guards and inmates being murdered. The prosecutor also asked mitigation witnesses Reverend Byron Eshelman and Dr. Carroll whether plaintiff was a dangerous man.

In paragraph D of this claim, petitioner also alleges that the prosecutor made several improper comments during closing argument:

> 1) he exhorted the jury to disregard constitutionally relevant mitigation: he said the jury was not to consider whether petitioner could function in prison (RT 5284); 2) he misadvised the jury about how the petitioner's background evidence was to be evaluated: he said that petitioner's background did not "mitigate[] the crime that is before you today (RT 5283); 3) he invited evidentiary comparisons precluded by Booth and Payne: that Ricky Van Zant's mother felt her son should not have gotten the death penalty (RT 5282-83); 4) that the jury should consider the "anguish and emotional scars" suffered by the victim of petitioner's 1980 crime, although no such evidence had been admitted (RT 5288); 5) he violated the rule of People v. Davenport, 41 Cal.3d

> 247 (1985); he argued that the absence of Factor H evidence--petitioner's mental capacity--was an aggravating factor; 6) he violated People v. Murtishaw, 29 Cal.3d 733 (1981): he argued that petitioner's future dangerousness was an aggravating factor; 7) he violated Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991): that petitioner lacked remorse (RT 5287); and 8) he asked the jury to consider constitutionally irrelevant information: that the financial cost of life without parole would be high (RT 5284, 5288).

Amended petition, p. 59-60 (paragraph D).

In paragraph E petitioner alleges that the closing argument provided the jury with a misleading and fundamentally incorrect and improper view of its sentencing responsibilities. In paragraph F, petitioner argues that the prosecutor's argument, alone and in combination with erroneous jury instructions, violated his right to a fair and impartial jury, not to be compelled to testify in his own behalf, to confront and cross-examine witnesses, to a reliable penalty decision, to a penalty decision which is not arbitrary or capricious, to equal protection and to due process. In paragraph G, petitioner argues that to the extent that counsel made no objection, counsel was ineffective.

As to the prosecutor's cross-examination of Warden Wilson regarding whether he had talked to victims' families and the murder rate in prison, the California Supreme Court found that this claim was waived due to the failure to object. Morris, 53 Cal.3d at 219, 279 Cal.Rptr. at 760. The California Supreme Court also found that the claim of prosecutorial misconduct based on the questioning of Dr. Carroll was also waived for failure to object. Morris, 53 Cal.3d at 220 n. 16, 279 Cal.Rptr. at 760. The Court addressed the claim regarding the cross-examination of Reverend Eshelman on the merits. Therefore, only the claims of prosecutorial misconduct in connection with the questioning of Warden Wilson and Dr. Carroll are procedurally barred.

As to petitioner's challenge to the closing argument,

the California Supreme Court stated,

> Defendant cites the prosecutor for misconduct in final argument, alleging "numerous improper comments." At the outset, we note that defendant interposed no objection at trial to any of the prosecutor's comments during final argument; therefore, defendant has waived any error or misconduct that could have been cured by a timely admonition. (People v. Bell, supra, 49 Cal.3d at p. 548; People v. Lang, supra, 49 Cal.3d at p. 1041; People v. Lucky (1988) 45 Cal.3d 259, 293 [247 Cal.Rptr. 1, 753 P.2d 1052].)
>
> Anticipating a waiver finding, defendant asserts that the prosecutor's argument was so egregious that reversal is compelled in any event, apparently because either the trial court should have restrained the prosecutor sua sponte or that defendant's trial counsel demonstrated his ineffectiveness by failing to object. Having reviewed the challenged portions of the prosecutor's argument, we find no merit in either argument.

Morris, 53 Cal.3d at 220, 279 Cal.Rptr. at 761.

It is clear that petitioner's claims of prosecutorial misconduct contained in paragraph D, E and F are defaulted. Moreover, the state supreme court's further finding that the prosecutor's argument was not so egregious so as to relieve petitioner of his default is simply the California court's required review of its exception to its own waiver rule. Petitioner has entirely waived his right to proceed on this claim.

Finally, although not raised in respondent's motion, it appeared to this court that part of petitioner's Claim I (Avette Barrett's testimony improperly admitted) was procedurally barred. The court discussed this issue with the parties at the March 12, 1997, oral argument and directed petitioner to file supplemental briefing regarding this matter.

Claim I alleges that Avette Barrett's testimony was improperly admitted because it was impermissibly coerced and false. One element of this claim was that Barrett's original plea

agreement included a condition that she take a polygraph test. On the eve of trial, this element of her plea agreement was omitted. Petitioner argues that the trial judge improperly refused to permit inquiry into whether or not Barrett had been required to take the polygraph examination and, if so, what the results were. The California Supreme Court found that this claim was waived:

> Defendant also argues that the prosecution was estopped to object to the admission of polygraph evidence because of the polygraph condition in Barrett's plea bargain. Defendant did not advance this argument in the trial court when the prosecutor's objection was made; he is now barred from asserting it. (Roam v. Koop (1974) 41 Cal.App.3d 1035, 1044 [116 Cal.Rptr. 539].)

Morris, 53 Cal.3d at 193 (n.6), 279 Cal.Rptr. at 742.

In the March 24, 1997, supplemental briefing, petitioner has directed the court to a portion of the transcript where defense counsel did object, apparently by way of a motion in limine, to his inability to question Barrett about the polygraph:

> Mr. Condit: There--as an offer of proof, we believe the evidence will show that Allison Eckstrom took a lie detector test, and that she didn't pass it. And that her sister on advise of counsel, refused to take it. And we will show that taking and passing a lie detector test was a written part of the plea bargain agreement. Although Evidence Code 351.1(a) bars evidence of a lie detector test with the exception of--by mutual stipulation, we feel the line of cases indicating that the defense should be able to cross-examine witnesses regarding anything that has anything to do with motive or bias control. And that if 351.1(a) is applied in such a fashion as to prevent us from demonstrating that the witnesses did not comply with the plea agreement, that it would be a denial of due process, and that, under that circumstances, Evidence Code Section 351.1(a)

would be unconstitutional. Therefore, at this time, we are asking the Court for an in limine ruling on whether or not we can ask any questions regarding the lie detector test. (RT:20:3892-93.)

Because it appears that petitioner's counsel did request to question Barrett regarding the polygraph, the court finds that this portion of Claim I is not procedurally barred.

As discussed above, although a claim may be defaulted, a federal court may still consider the claim if the petitioner demonstrates 1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or 2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. at 1943. Applying these standards, the court now turns to whether it may review any of the claims found defaulted above.[13/]

As petitioner has not addressed the issue of procedural default in his pleadings, the court finds that he has failed to demonstrate cause for the default as to any of the claims. The court will not speculate on petitioner's behalf in this matter. For that reason, there is no need to examine prejudice. Also, petitioner has not demonstrated the existence of a fundamental miscarriage of justice, i.e. actual innocence for any of the claims discussed in this section related to the guilt phase. However, as the court deferred ruling on the miscarriage of justice issue for certain penalty phase issues in the Clark

---

13. Respondent argues that in a claim found procedurally defaulted based on a failure to make a contemporaneous objection, the Ninth Circuit does not apply the cause and prejudice standard in determining whether the federal court may review the claim. Rather, respondent argues, the Ninth Circuit reviews for "plain error, error that is highly prejudicial and affects substantial rights." Williams v. Calderon, 52 F.3d 1465, 1482 (9th Cir. 1995). After reviewing Williams, the court finds that the Ninth Circuit applies the plain error standard in a situation where the claim was not expressly found defaulted by the state supreme court based on the failure to make a contemporaneous objection, even though such an objection should have been made. In a situation, such as in the instant case, where a claim was found defaulted based on the failure to make a contemporaneous objection, the cause and prejudice standard still applies.

section, it will do so here as well. Therefore, the court recommends that the following claims are finally procedurally barred: Claim III (admission of testimony), Claim IX (Best Evidence and more prejudicial than probative objections, but not on a relevancy or ineffective assistance of counsel basis), Claim XI (on the objections to Ms. Helms' testimony, but not on the failure of the trial court to require a stipulation), Claim XII; Claim XXIX involving penalty phase alleged prosecutorial misconduct is barred with respect to witnesses Wilson and Carroll but not with respect to Eshelman, and paragraphs D, E and F. Claim I is not procedurally barred.

As to the claim XXIX the court will defer its miscarriage of justice analysis.

IV. Exhaustion

Respondent argues that several of petitioner's claims are not exhausted. In particular, respondent claims that petitioner's claims contained in Claim XVI of the amended petition, paragraphs B, C, G and H are not exhausted. Respondent also contends that petitioner's claim contained in Claim VII, paragraph D (alleging ineffective assistance of counsel regarding the Nebraska arrest warrant) is not exhausted. On March 24, 1997, petitioner filed supplemental briefing addressing the exhaustion issue.

A. Legal Standard

The exhaustion of available state remedies is a prerequisite to a federal court's consideration of claims sought to be presented in habeas corpus proceedings. See Rose v. Lundy, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971), Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

Generally, a mixed petition will require dismissal, Gordon v. Vasquez, 107 F.3d 756, amended 1997 WL 183877 (9th Cir. 1997); however, the Ninth Circuit has also recognized that a petitioner cannot subvert the capital habeas process by continually appending new (unexhausted) claims to successive petitions. Cf. Farmer v. McDaniel, 98 F.3d 1548, 1559-1560 (9th Cir. 1996); Fed. Habeas Rule 9(b). In the case where a petitioner attempts to accomplish the same "piecemeal litigation" approach in a context where the initial petition was stayed and not dismissed, there is no sensible reason why the court would not be able to simply strike such claims. Id.

As noted above in the second Clark analysis, petitioner knew full well that the purpose of filing the initial federal petition prior to exhaustion was to permit petitioner to raise all new claims once and for all in order that those new claims could be exhausted prior to the court's ruling on the merits of all fairly presented claims. Order, April 2, 1993 at 2-3. Also as indicated above, petitioner was given approximately $100,000.00 to accomplish this task. Prior to the filing of any amended petition after exhaustion, petitioner was put on express notice that the amended petition after exhaustion was to include *no unexhausted claim.* Order, January 11, 1996. Respondent was ordered to make a motion to strike any claims which respondent did not believe to be exhausted:

> A motion to strike in lieu of a motion to dismiss for exhaustion is the appropriate motion to be made for those claims which at this juncture of the case are truly unexhausted. To allow the addition of unexhausted claims would turn these capital habeas proceedings into a perpetual motion process between the state and federal courts--a type of exhaustion paralysis at best. If the recent amendments add new claims the court should not permit such new claims to be stated at this time in the absence of extraordinary cause--new claims should be stricken with prejudice, not dismissed without prejudice.

Order, January 11, 1996 at 2-3.

The court's permission to amend the petition after

exhaustion was predicated on petitioner's not adding unexhausted claims to the reinvigorated federal proceedings in the absence of extraordinary cause. In certain respects indicated below, petitioner has violated this court's order, and claims asserted in violation of the order should be stricken.

B. Discussion

Petitioner's March 24, 1997, supplemental briefing does not address whether the portion of claim VII alleging ineffective assistance of counsel regarding the Nebraska search warrant is exhausted. At oral argument, petitioner's counsel stated that she could not find where this issue was raised. (Transcript from March 12, 1997, hearing, p. 3:10.) It appears that this claim is unexhausted and there is no good cause why petitioner should be allowed to proceed with this claim. For that reason, the court recommends that it be stricken.

Claim XVI, paragraphs B, C, G and H allege jury instruction error. Paragraphs B and C allege that the jury was erroneously instructed that there were two standards for determining whether there had been a first degree murder: when there is an unlawful killing with malice aforethought or whether there is a killing during the commission of a felony. Petitioner argues that in the next paragraph of the instructions, malice aforethought was not mentioned but murder in the commission of robbery was. Petitioner argues that these instructions unconstitutionally deleted an essential element of murder from jury consideration.

Paragraph G alleges that other instructions mis-defined the mental state requirements which were predicates for first or second degree murder. The amended petition alleges that they were:

> For the purpose of the case on trial, you must assume that the defendant was of sound mind at the time of his alleged conduct, which, if it is charged, constituted the crimes charged in the information. (RT 4894.)

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly or actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental. (RT 4896.)

> To constitute second degree murder there must be, in addition to the death of a human being, an unlawful fact [emphasis added] which was the proximate cause of that death. (RT 4899.)

Paragraph H alleges that instructions relating to heat of passion were also incorrect or wrongly refused. Petitioner claims that the trial judge refused the defense request to instruct pursuant to CALJIC 8.73.

In the March 24, 1997, supplemental briefing, petitioner argues that these claims were presented in Appellant's Opening Brief, pages 150-56. It appears that the allegations contained in paragraphs B and C are contained in the opening brief, beginning at page 150. It also appears that the allegations contained in paragraph H regarding the failure to instruct with CALJIC 8.73 are contained in the opening brief at pages 152-153. However, the court can find no specific reference to the instructions alleged in paragraph G. For that reason, the court finds that the challenge to the instructions contained in paragraph G is not exhausted and should be stricken from the amended petition.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss all claims raised in petitioner's second state petition for writ of habeas corpus on grounds that they were denied as untimely be granted as

follows: Claims VIII (altering theories of admissibility), XVII, and XXXVII (A, C, D, E, F, I, J, K, L, N, O, P) should be finally procedurally defaulted; Claims XXXVII (B, G, H, M), and XXXVIII should be procedurally defaulted pending a final determination of the miscarriage of justice exception to the procedural default doctrine;

2. Respondent's motion to finally dismiss as procedurally defaulted the following claims raised in petitioner's state appeal be granted in part as follows: Claim III (admission of testimony), (relevance admission of testimony of Anthony Brooks); Claim IX, (admission of Barrett letter violated Best Evidence Rule and was not more prejudicial than probative); Claim XI, (testimony of Van Zandt's mother should not have been admitted); Claim XII (trial court improperly required disclosure of county jail inmate witnesses). Claim XXIX (challenges to prosecutorial misconduct in connection with questioning of Warden White and Dr. Carroll), as well as prosecutorial misconduct in connection with closing argument alleged in paragraph D, E, F, should be procedurally defaulted, but the court reserves its miscarriage of justice analysis on Claim XXIX;

3. Respondent's motion to strike as unexhausted: Claim VII and XVI paragraph G be granted, and these claims found unexhausted be stricken from the amended petition; Claim XVI, paragraphs B, C, and H be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections.

The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's

order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 23, 1997.

s/GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:kj:de
Morris2.157

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS,

Petitioner, No.CIVS-92-0483 EJG GGH P

vs FINDINGS AND RECOMMENDATIONS

ARTHUR CALDERON,

Respondent. **DEATH PENALTY CASE**

_____/

INTRODUCTION AND SUMMARY

Petitioner, Bruce Wayne Morris, is a state prisoner proceeding with a petition for writ of habeas corpus by a person under sentence of death pursuant to 28 U.S.C. § 2254. Respondent, Arthur Calderon, the warden of San Quentin Prison, has moved for summary judgment on the merits as to all claims stated in the amended petition for writ of habeas corpus filed January 17, 1996.

By way of separate Findings and Recommendations filed on March 3, 1998, the undersigned has recommended that judgment on Claims XXXVI (36) (in part) and XL (40) [transmission and confirmation of erroneous jury instruction] be awarded in favor of petitioner, and that the writ of habeas corpus be granted insofar as the penalty phase of petitioner's trial is concerned. Also, on July 2, 1997, the district court adopted the Findings and Recommendations involving procedural default of specified claims filed May 27, 1997. The precise ruling on procedural default, which dismissed several claims with prejudice, and tentatively dismissed others pending a showing of a miscarriage of justice, is described in full below. All other claims in the amended petition are discussed herein. It is the recommendation of the undersigned that summary

judgment on all remaining claims be awarded in respondent's favor, and that the writ be denied except insofar as set forth above.

ORGANIZATION

The organization of these lengthy Findings is difficult in that certain factual material and issues important to the results of these Findings overlap the separate sections listed in the amended petition. It is therefore problematic to treat the issues in the Amended Petition one by one in the order in which they appear. Rather than unnecessarily repeat facts and legal discussion, the court has attempted to resolve all claims with common issues, as proximate to each other herein as possible. The court will divide the substantive discussion into the following major areas:

I. Pretrial Issues
II. Guilt Phase Issues
III. Guilt Phase Jury Instruction Issues
IV. Miscellaneous Guilt Phase Issues
V. Penalty Phase Issues
VI. Penalty Phase Jury Instruction Issues

The detailed organization of these Findings is as follows:

Page

INTRODUCTION AND SUMMARY 1
FACTUAL BACKGROUND 6
A. Guilt Phase 7
B. Penalty Phase 10
PROCEDURAL BACKGROUND 11
A. State Court 11
B. Federal Court 13
APPLICABILITY OF THE AEDPA 16
SUMMARY JUDGMENT STANDARDS IN HABEAS CORPUS 16
A. Procedural Background 16
B. Requirement that an Evidentiary Hearing is Appropriate Under Habeas Law 17
C. Applicability of Summary Judgment Procedures 19
I. PRETRIAL ISSUES 20
A. Claim XXV: Prosecutor Improperly Used Peremptory Challenges to Exclude Jurors With Reservations About Capital Punishment 20

B. Claim XXVI: Six Pro-death Jurors Should Have Been Removed 21
II. GUILT PHASE ISSUES 23
A. Claims I & II: Relating to Plea Agreements of Barrett and Eckstrom 23
B. Claims III & V: Failure to Disclose Consideration Brooks and Wharton Received for Testimony Plot 40
C. Challenges to Admission of Evidence: Claims IV, VIII, IX, X, XI, XII 43
1 Claim IV: Improper Impeachment with Priors Conviction 44
2. Claim VIII: Improper Admission of Excluded Evidence 48
3. Claim IX: Improper Admission of Letter from Petitioner to Barrett 54
4. Claim X: Admission of Evidence Obtained Through Unreliable Scientific Methods ... 55
5. Claim XI: Testimony of Van Zandt's Mother Improperly Admitted 59
6. Claim XII: Prosecution Questioning Defense Witness Re: Devil Worship 61
D. Claims VI and VII: Claims Regarding Petitioner's Nebraska Arrest 63
1. Claim VI: Improper Admission of Petitioner's Statement to Law Enforcement Officers .. 63
2. Claim VII: Warrantless Arrest 71
E. Claim XIII: Petitioner's Absence From Trial .. 72
III. GUILT PHASE INSTRUCTIONS: CLAIMS XIV, XVI, XIX, XX, XXI XXII, XXIII 74
A. Claim XIV: Accomplice Instructions 75
B. Claim XVI: Instructions Failed to Distinguish Between Degrees of Murder 79
C. Claim XIX: Failure to Instruct that Felony Murder Does Not Apply to Assault with a Deadly Weapon 82
D. Claim XX: Irrelevant Instructions at Guilt Phase 84
E. Claim XXI: Refusal to Give Instructions Proffered by Defense 85
F. Claim XXII: Trial Judge Failed to Give Required Sua Sponte Instructions 90
G. Claim XXIII: Consciousness of Guilt Instruction Improperly Given 94

IV. MISCELLANEOUS GUILT PHASE ISSUES 96
A. Claim XV: Insufficient Evidence 96
B. Claim XVIII: Failure to Sequester Jury 98
C. Claim XXIV: Caldwell Error 99
V. PENALTY PHASE ISSUES 102
A. Claims XXVII, XXVIII: Challenges to Evidence Admitted at Penalty Phase 102
1. Claim XXVII: Admission of Evidence re: Facts Underlying Petitioner's Prior Convictions 102
2. Claim XXVIII: Admission of Evidence in Aggravation Without Proper Notice 109
B. Claim XXIX: Prosecutor Committed Misconduct in Examining Defense Mitigation Witnesses and During Closing Argument 112
C. Claims XXX, XXXII, XXXIV, XXXV: Jury Instruction Error 124
1. Claim XXX: Factors in Aggravation Artificially Inflated by Instructions 124
2. Claim XXXI: California Statute Overly Broad and Vague 126
3. Claim XXXII: Trial Judge Failed to Instruction that the Jury Could Consider in Mitigation Sentences Given to Co-defendants 128
4. Claim XXXIII: Trial Judge Refused to Modify CALJIC 8.84.1 130
5. Claim XXXIV: Trial Judge Failed to Delete Unnecessary Factors from Jury Consideration 131
6. Claim XXXV: Failure to Instruct on Petitioner's Decision Not to Testify 133
D Claims XXXVI and XL: Trial Judge Committed Error When He Caused Jury to Reveal its Numerical Division and Gave Incorrect Response 134
E. Claim XXXVII and XXXVIII: Ineffective Assistance of Trial and Appellate Counsel and Petitioner's Incompetence To Assist Trial Counsel 137
F. Claims XXXIX & XLIII: Cumulative Errors at Both Phases 152
G. Claim XLI: Trial Judge Improperly Denied Petitioner's Automatic Motion for Modification of Penalty 152
H. Claim XLII: California Statute is Unconstitutional in

Practice and Application 155

FACTUAL BACKGROUND

The court gives here only a summary sketch of the factual background of the capital crime for which petitioner was convicted. This background information regarding the guilt and penalty phases is taken nearly verbatim from the opinion of the California Supreme Court. People v. Morris, 53 Cal.3d 152, 175-179, 279 Cal.Rptr. 720, 730-733 (1991) disapproved in part, People v. Stansbury, 9 Cal. 4th 824, 38 Cal.Rptr. 2nd 394 (1995).[1] Respondent's summary judgment motion contains a discussion of the background information, while none of petitioner's pleadings submitted in this case do. A detailed discussion of the facts pertinent to each claim, where necessary, is given in the individual sections.

A. Guilt Phase

The body of Rickey Van Zandt was found face down at the bottom of a hill by Sierra County law enforcement officers. His skull was crushed; he had been beaten to death. Petitioner admitted on several occasions before and after his arrest that he had hit Van Zandt over the head at least 13 times with a rock and a stick in order to steal his van. After striking the fatal blows, petitioner left the scene in the van with his two female companions and drove out of the state, where he was apprehended. At his trial, petitioner repudiated his numerous admissions of guilt and blamed his companions for Van Zandt's murder. The jury rejected this testimony and found him guilty. After it heard penalty phase evidence that focused on petitioner's prior offenses of attempted rape and kidnaping, it returned a verdict of death.

On September 9, 1985, petitioner began hitchhiking from Sacramento toward the north shore of Lake Tahoe. He was accompanied by his girlfriend, Avette Barrett, and her sister, Allison Eckstrom. The three were picked up by Rickey Van Zandt in his van on September 11 or 12. They accompanied

---

1. After independently reviewing the record, the court finds the summary of events contained in the opinion of the California Supreme Court to be accurate.

him to Truckee, where he stopped at a store and went in, leaving his car keys in the ignition. While Van Zandt was in the store, petitioner suggested that he and his companions steal the van. Eckstrom pulled out a knife from a pouch behind the passenger seat and petitioner suggested he could "stick" Van Zandt and they could take the van. The women expressed reservations. Petitioner then suggested taking Van Zandt to a nearby river and stabbing him there.

When Van Zandt returned to the van, he and petitioner discussed going fishing. They drove to a remote area off a dirt road in Sierra County. While the women were cooking dinner, petitioner and Van Zandt walked together toward the river to begin fishing. He told the women that he would get behind Van Zandt while they were fishing and "get him." Barrett replied, "Whatever," and Eckstrom said it was good that she and Barrett would not have to see it. Petitioner took the knife and went down to the river. When petitioner and Van Zandt returned 20 to 30 minutes later, petitioner explained to Eckstrom that he had not been able to stab him because he could not get behind him.

Van Zandt, who had been drinking, continued to do so while having dinner with petitioner and the women in the van. After dinner, Van Zandt lay down on a bed in the rear of the van. At petitioner's request, the women left. Emerging a few minutes later, petitioner announced: "He's out." He put his arm around Barrett and asked Eckstrom for a rock. He rejected her choice of rocks and directed her to pick up another. He took the rock from Eckstrom, told Barrett he loved her, and said he was going to hit Van Zandt on the head.

Petitioner reentered the van. Eckstrom and Barrett heard Van Zandt exclaim, "Ouch, that hurts, stop," and then heard smacking sounds ("like someone hitting a melon") and screams. Petitioner later told Eckstrom that he had hit Van Zandt on the head 13 times with the rock. Fifteen to twenty minutes later, the women observed Van Zandt's body drop out of the van. Covered with blood, petitioner emerged and dragged the body to the front of the van. Van Zandt was still alive. He was moaning; blood and brain fluids oozed from his head.

Petitioner dragged Van Zandt's body from the area of the van and rolled it down a slope. He went down to the body and looked through Van Zandt's pockets. He told Barrett that he was searching for a wallet.

Van Zandt continued moaning and holding his head. Eckstrom, who had been asked by petitioner to watch the body,

called out that it was moving. Petitioner replied that he already knew this. He picked up a stick, lifted it over his head, told Van Zandt that he was sorry, and hit him on the back of the head 3 times. Van Zandt collapsed to the ground. As the three drove away in Van Zandt's van, Eckstrom observed him still lying on the ground, quivering.

Van Zandt's dead body was found September 17, five or six days after he was left at the bottom of the slope. A post mortem examination established that he died from massive trauma to the skull. His head was stationary when the trauma was inflicted. There were fragments of wood in his brain. His injuries were consistent with the infliction of nine to fourteen blows with a blunt object such as a rock or stick.

After leaving Van Zandt, petitioner and the two women drove around the Western and Central United States, eventually entering Nebraska. They used credit cards found in the glove compartment of the van to make purchases. On September 14, they picked up hitchhiker Tom Logan. Eckstrom told Logan that petitioner had killed Van Zandt. Petitioner asked Logan whether he had noticed the blood and brain tissue in the van and explained that he had killed Van Zandt in order to steal his vehicle. Eckstrom told Logan that they "really rocked and rolled him." Later, at a campground, petitioner told Logan that he had been "kind of coerced into killing this man." According to petitioner, he merely wanted to knock Van Zandt out, but Barrett wanted to kill him. Logan fled the trio and called the police. The three were arrested the next day. Among the items seized at the time of arrest were petitioner's jeans, which were spattered above the knees with blood.

Shortly after he was taken into custody, petitioner asked to speak to an officer. He agreed to make a statement. When permitted to talk to Barrett before his interview, he assured her that he would not "let [her] suffer for something [she] didn't do."

In an hour interview with officers, petitioner admitted hitting Van Zandt on the head 12 to 14 times with a rock and a stick. He described the rock as the size of a softball. He first stated that he might have talked about killing Van Zandt to acquire the van, but then modified his statement to say that he only wanted to knock him out and tie him up. He stated that Barrett and Eckstrom told him not to do anything to Van Zandt, but that he told them to "take off" while he "finished what [he was] going to do." He said that after the women left, he

"knocked the man out and pulled him off to the side of the hill." According to petitioner, he hit Van Zandt with the stick when he started to get up, swinging the stick like a baseball bat.

Later, while in custody in California, petitioner wrote a letter to Barrett. The letter was postmarked October 7, 1985, and was intercepted by jail authorities the next day. It stated in part: "I've killed once for you and if I have to I'll do it again!!! And you know that I can and I don't need a rock to do it either." Petitioner also acknowledged in front of two other Sierra County jail inmates that he had "bashed" a man's skull with a rock 13 times.

In defense, petitioner testified on his own behalf. He denied killing Van Zandt, claiming that he had admitted doing so only to protect Eckstrom and Barrett. Petitioner stated that Van Zandt was killed by the two women when he tried to rape Barrett. According to petitioner's testimony, Van Zandt had returned to the van while petitioner was still fishing. When petitioner later returned, he found Eckstrom upset and Barrett crying. Both women had blood on their dresses. Barrett explained that she had killed Van Zandt by hitting him with a rock when he had tried to rape her in the van. Petitioner then pulled Van Zandt, still alive, out of the van. Eckstrom hit him with a stick and mumbled that she had killed him.

A serologist called as a defense expert testified that she had found traces of semen on Van Zandt's underwear; however, she conceded on cross-examination that these traces could have been deposited anytime since the underwear was last laundered, that they could have been deposited by a partial voiding of the bladder upon death, and that they were not necessarily deposited by ejaculation. She found no semen on Van Zandt's jeans.

Several female Nevada County jail inmates also testified to statements made by Barrett implying that petitioner was taking responsibility for Van Zandt's murder out of misplaced love for her. All three conceded, however, that Barrett had made inconsistent statements about the murder. One witness offered her opinion that Barrett was a liar.

At the close of the guilt phase, the jury found petitioner guilty of first degree murder and robbery and further found as a special circumstance that the murder was committed while petitioner was engaged in the commission of a robbery.

B. Penalty Phase

In aggravation, the prosecution introduced petitioner's prior felony convictions. Petitioner was convicted in 1978 of kidnaping, attempted rape, and assault with intent to commit rape on a 15 year old girl. He was also convicted in 1980 of stealing a car and kidnaping its driver, a 61 year old woman. In mitigation, the defense presented evidence of petitioner's troubled childhood. He was hyperactive and unable to read until he was 15. He was harshly disciplined by his parents and choked by a teacher. Petitioner had once helped people involved in a car accident at some risk to his own safety and had saved his brother's life when he suffered a heart attack. The defense also presented evidence of petitioner's artistic ability, his love for animals, and his leadership in the Boy Scouts.

Two experts with experience as prison officials testified that petitioner would be a successful life prisoner. They observed that he had developed work skills while in jail (landscaping and sewing) and had learned the deaf alphabet to assist deaf prisoners. However, he had also been involved in a stabbing incident. A psychologist testified that petitioner has a mild-to-moderate brain dysfunction. In her view, although petitioner knew the difference between right and wrong at the time of the offense, he lacked the ability to control his conduct because the brain dysfunction rendered him unable to understand the long-term consequences of his acts. A psychiatrist testified that petitioner had a borderline personality with dependent and antisocial features and an atypical brain syndrome. He attributed petitioner's "antisocial behavior" to his brain condition and psychological disorders.

PROCEDURAL BACKGROUND

A. State Court

On February 28, 1986, an information was filed in the Sierra County Superior Court charging petitioner with Count 1, murder (Cal. Penal Code § 187), Count 2, robbery (Cal. Penal Code § 211), Count 3, car theft (Cal. Veh. Code § 10851). In connection with the murder charge, it was alleged as a special circumstance that the murder occurred while the petitioner was engaged in the commission of a robbery and that petitioner

intended to kill the victim.

On August 29, 1986, petitioner filed a motion for change of venue. On September 12, 1986, the court granted the motion. The Sierra County Superior Court transferred the case to San Joaquin County for further proceedings.

On January 20, 1987, an amended information was filed in the San Joaquin County Superior Court charging petitioner with murder (Count 1) and robbery (Count 2). In conjunction with the murder charge, it was alleged as a special circumstance that petitioner committed the murder while engaged in the commission of a robbery and that he intentionally killed the victim. It was alleged in conjunction with both counts that petitioner personally used a deadly and dangerous weapon within the meaning of Cal. Penal Code § 12022(b). It was further alleged that petitioner had been convicted of two prior serious felonies within the meaning of Cal. Penal Code § 667(a) and served a prior separate prison term within the meaning of Cal. Penal Code § 667.5(b).

On January 29, 1987, a corrected, amended information was filed. The amended information charged petitioner with the same offenses as alleged in the amended information and corrected a typographical error contained in the January 20, 1987, information.

On June 22, 1987, the jury found petitioner guilty of first degree murder and robbery. The special circumstances and the weapon allegations were found to be true. On the same day, petitioner moved to waive the jury trial as to the prior serious felony and prior separate term allegations. On July 7, 1987, the court found the allegations of a prior serious felony and prior separate prison terms to be true. On July 7, 1987, the penalty phase commenced. On July 17, 1987, the jury determined the appropriate penalty to be death.

Following his conviction, petitioner filed an automatic appeal to the California Supreme Court. On March 28, 1991, the California Supreme Court affirmed the judgment in all respects. People v. Morris, 53 Cal.3d 152, 279 Cal.Rptr. 720 (1991). Justices Mosk and Broussard filed separate opinions dissenting from the affirmance of the guilt and penalty judgments. Petitioner filed a timely petition for certiorari in the United States Supreme Court. The Court denied the petition on November 12, 1991. Morris v. California, 112 S.Ct. 421 (1991).

On September 7, 1990, a habeas corpus petition was filed

on petitioner's behalf in the California Supreme Court. The California Supreme Court denied the petition on the merits and without comment on December 13, 1990. On December 1, 1995, a second petition for writ of habeas corpus was filed in the California Supreme Court on petitioner's behalf. On December 6, 1995, the California Supreme Court denied the petition on the merits and based on a procedural bar, citing In re Clark, 5 Cal.4th 750, 767-782 [successive petitions], 783-787 [delay], 797-798 [exceptions] (1993).

B. Federal Court

On March 27, 1992, petitioner filed an application for appointment of counsel and request for stay of execution in this court. On August 12, 1992, counsel was appointed to represent petitioner. After several delays and court orders thereon, on June 15, 1993, counsel filed a petition for writ of habeas corpus on petitioner's behalf in this court. On December 6, 1993, this court issued an order staying the case to allow petitioner to exhaust his state remedies.

Following the California Supreme Court's denial of his second state petition for writ of habeas corpus, petitioner returned to federal court and on January 17, 1996, he filed a first amended petition for writ of habeas corpus. In mid-July 1996, the court received a letter from petitioner requesting that his federal habeas proceedings be withdrawn. During the initial hearing to confirm petitioner's desires in this regard, petitioner requested that he be permitted to "withdraw his withdrawal." Over respondent's objection, the federal habeas proceedings were ordered to proceed.

In respondent's summary judgment motion filed May 15, 1996, respondent argued that all claims raised in petitioner's second state habeas petition were procedurally barred because the California Supreme Court found that they were not timely raised pursuant to In re Clark, 5 Cal.4th 750 (1993). Respondent also argued that several other claims raised in petitioner's state appeal were procedurally barred because the California Supreme Court rejected them because of petitioner's failure to object at trial. Respondent also argued that several other claims were not exhausted, and should be stricken.

On May 27, 1997, this court issued findings and recommendations addressing these threshold arguments. The undersigned recommended that respondent's motion to default

claims raised in the second state habeas petition with respect to a timeliness bar be finally granted as follows:
Claim VIII – Evidence that the trial court had initially excluded was erroneously admitted in violation of due process;
Claim XVII – Petitioner was deprived of his right to a unanimous jury determination;
Claim XXXVII (A, C, D, E, F, I, J, K, L, N, O, P) – Several allegations of ineffective assistance of counsel:

A. Counsel failed to challenge for cause jurors whose bias was unquestionably shown and to exercise peremptory challenges against these jurors.

C. Counsel failed to investigate and present background evidence concerning Avette Barrett and Allison Eckstrom.

D. Counsel failed to investigate and present background evidence concerning jailhouse informants Wharton, Weaver and Anthony Brooks.

E. Counsel failed to investigate and present background evidence concerning Ricky Van Zandt.

F. Counsel failed to investigate and challenge the forensic evidence the prosecution presented at trial by consulting with appropriate defense experts and challenging the conclusions at trial of the forensic experts.

I. Counsel failed to investigate the effect of petitioner's drug use on his mental state at the time of the alleged homicide.

J. Counsel Shattuck's failing health materially interfered with his ability to zealously defend petitioner.

K. Counsel did not investigate the constitutional validity of petitioner's prior convictions and nonetheless stipulated to their admissibility.

L. Counsel failed to object to the admissibility of excludable evidence, to seek the admission of

favorable evidence, to consult with necessary and appropriate experts, and to formulate and submit appropriate instructions at both phases of trial.

N. Counsel failed to uncover and challenge the conflicts of interest suffered by the Sierra County District Attorney's Office, which gave immunity to Barrett and Eckstrom, and to seek its removal as the prosecuting agency.

O. Counsel failed to investigate the capital charging policies of the Sierra County District Attorney's Office and to discover that those policies were arbitrary and capricious and violated constitutional standards.

P. Appellate counsel was ineffective for failing to investigate and raise the issues listed above.

Claim XXXVIII - Petitioner lacked competency to stand trial; Claims XXXVII (B, G, H, M) and XXXVIII were ordered procedurally defaulted pending a final determination of the miscarriage of justice exception (*penalty phase and competency to stand trial claims only*) to the procedural default doctrine. Because those claims will be discussed herein, the court does not describe them at this point.

This court further recommended that respondent's motion to dismiss as procedurally defaulted the following claims raised in petitioner's state appeal be granted in part on the grounds of failure to object or timely object at trial as follows:
Claim III -- Admission of evidence regarding escape attempt;
Claim IX -- Admission of Barrett letter violated Best Evidence Rule and was more prejudicial than probative);
Claim XI -- Testimony of Van Zandt's mother should not have been admitted;
Claim XII -- Trial court improperly required disclosure of defense county jail inmate witnesses.
This court recommended that Claim XXIX (challenges to prosecutorial misconduct in connection with questioning of Warden White and Dr. Carroll), as well as prosecutorial misconduct in connection with closing argument alleged in paragraph D, E and F, should be procedurally defaulted, but the court reserved its miscarriage of justice analysis on Claim

XXIX.

Finally, the undersigned recommended that certain claims be stricken because these claims remained unexhausted even after petitioner had returned to state court a second time for the purpose of exhaustion. The undersigned recommended that the district judge strike Claims VII (ineffective assistance of counsel in failure to obtain an arrest warrant) and XVI paragraph G (mental state jury instructions). The court recommended that respondent's motion to strike Claim XVI, paragraphs B, C and H as unexhausted be denied.

On July 2, 1997, the district court adopted these findings and recommendations in their entirety.

APPLICABILITY OF THE AEDPA

This action was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act. Therefore, the Chapter 153 amendments to 28 U.S.C. §2254 do not apply to the adjudication of this case. Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059 (1997). Therefore, the standards utilized throughout these Findings and Recommendations are those of the pre-AEDPA.

SUMMARY JUDGMENT STANDARDS IN HABEAS CORPUS

A. Procedural Background

Habeas corpus review is not a civil action "from scratch." Federal courts are not to engage in a general retrial of all claims tried and untried in the state criminal proceeding. The petitioner has the burden to specifically allege and demonstrate error of constitutional proportion, McKenzie v. McCormick, 27 F.3d 1415, 1418 (9th Cir. 1994), although the court has the ultimate "burden" to determine for itself whether the error was harmless, or whether it has grave doubt that such error was harmless. Importantly, petitioner may not speculate or hypothesize about alleged error--petitioner must possess a colorable factual basis for claimed constitutional error before the claim may stand as a basis for evidentiary hearing and the possible overturning of a state conviction, Ortiz v. Stewart, ___ F.3d ___, 1998 WL349467, *8 (9th Cir. 1998); Williams v. Calderon, 52 F.3d 1465, 1484 (9th Cir. 1995); the petitioner

must allege facts that point to the "real possibility" of constitutional error. Blackledge v. Allison, 431 U.S. 63, 75 (n.7), 97 S.Ct. 1621, 1630 (1977); Wacht v. Cardwell, 604 F.2d 1245, 1246 (9th Cir. 1979); there must be some evidentiary "spelling out" of the constitutional claim, Gentile v. Mancusi, 426 F.2d 238, 239 (2d Cir. 1970), i.e. the pleader must lay a foundation for proper factual averments and competent evidence must support the averments. Davis v. Bomar, 344 F.2d 84, 86 (6th Cir. 1965). The district court is afforded "wide latitude" in assessing the need for an evidentiary hearing. Ortiz, supra.

Nor is petitioner entitled to speculate about a claim in the first instance, and then request investigative monies and discovery to determine whether there is any factual basis for the speculated claim. The court's point has been put best by Aubut v. Maine, 431 F.2d 688, 689 (1st Cir. 1970), adopted by Calderon v. Nicolaus, 98 F.3d 1102, 1106 (9th Cir. 1996): "Habeas corpus is not a general form of relief for those who seek to explore their case in search of its existence." This is true even for the ordinary civil action where a plaintiff may not allege claims without a good faith basis for asserting facts and law. Fed. R. Civ. P. 11. It is even more true where the petitioner must sign the petition under penalty of perjury, and must give as specific and true a basis for the claimed error that he can muster at the time.

B. Requirement that an Evidentiary Hearing is Appropriate Under Habeas Law

In order to avoid summary adjudication of claims in habeas, petitioner first has to be entitled to an evidentiary hearing on the claim. Not every habeas claim warrants a factual hearing. Thus, for example, claims about erroneous jury instructions, error in evidence admission/exclusion, sufficiency of the evidence, most determinations of "prejudice," etc. are all claims that are reviewed from the record of the trial itself. Moreover, for certain claims, that the courts have held not cognizable in habeas, e.g., "psychiatric expert malpractice", there will be no factual development since the claim is not viable in the first instance. Finally, in many instances, a state court's factual findings are entitled to a presumption of correctness. 28 U.S.C. § 2254(d); Miller v. Fenton, 474 U.S. 104, 111-112, 106 S.Ct. 445, 450 (1985). Even if a claim is of

a type that might warrant an evidentiary hearing, if petitioner has defaulted on proper development of the claim in state proceedings, there will be no evidentiary hearing. Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715 (1992).

> A federal court must hold an evidentiary hearing on a constitutional claim only when the state court has not provided a hearing, the petitioner alleges specific facts which, if proved, would entitled him to relief, and there is a genuine factual dispute in the record. '[B]old assertions on a critical issue in a habeas petition, unsupported and unsupportable by anything else contained in the record, are insufficient to warrant an evidentiary hearing.' The petitioner must set forth specific allegations of fact, not mere conclusory allegations. (citations omitted).

Johnson v. Scott, 68 F.3d 106, 112 (5th Cir. 1995)(capital case).

This court, of course, follows binding Ninth Circuit precedent on the issue of the requirement for an evidentiary hearing. See Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir. 1992) et al., for the proposition that "a petitioner is entitled to an evidentiary hearing upon a showing that the allegations contained in a petition would entitle the petitioner to relief and no full and fair hearing was held by the state court on those facts." See also, Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997). While certainly correct and binding, Hendricks and Jones beg the issue here. The issue herein for many claims is whether the allegations of the petition are sufficiently colorable to warrant an evidentiary hearing. Williams v. Calderon, supra.

Of course, if one is not entitled to a factual hearing, one is not entitled to discovery or investigative monies for the claim--there would be no purpose served for these investigative procedures. See, Deputy v. Taylor, 19 F.3d 1485 (3rd Cir. 1994).

Discovery is only permitted when petitioner demonstrates good cause for the discovery. Rules in Habeas Corpus Proceedings, Rule 6; Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993). See also McDaniel v. U.S.D.C., 127 F.3d 886 (9th Cir. 1997) (discovery in habeas corpus actions is within the discretion of the district court and is permitted upon a showing of good cause). While once a colorable claim is stated, liberal discovery should be allowed, Liebman, Federal Habeas Corpus Practice and Procedure, section 19.4(e); McDaniel, supra, habeas corpus discovery has never allowed

fishing expeditions. Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994)(capital case). Thus, if petitioner has not demonstrated the necessity for discovery, the asserted lack of discovery is not a factor in ruling on a motion for summary judgment or adjudication. The good cause requirement for discovery dovetails with the requirement to have first factually stated a colorable claim which entitles a petitioner to a factual hearing, i.e. if petitioner has not set forth a colorable claim in the petition, he is entitled to neither discovery nor an evidentiary hearing. The Supreme Court recently confirmed this court's view of the availability of discovery in habeas actions. Bracy v. Gramley, ___ U.S. ___, 117 S.Ct. 1793 (1997) (discovery available only for good cause, and the Supreme Court "emphasized" in Gramley that petitioner therein had shown good cause because he had specifically supported his request with colorable evidence pointing to a real possibility of constitutional error).

C. Applicability of Summary Judgment Procedures

The summary judgment procedure of Fed. R. Civ. P. 56 is properly invoked in a habeas review proceeding, Blackledge v. Allison, supra, and assuming that an evidentiary hearing would otherwise be potentially appropriate, petitioner must demonstrate that there are *material*, disputed issues of fact which preclude summary judgment.[2] That is, if petitioner has stated a non-speculative claim for which an evidentiary hearing is necessary, and there are established material facts in dispute, either by virtue of legitimate facts pled in the petition or legitimate evidence outside the record neither of which is barred by Keeney, petitioner will be entitled to an opportunity to fully develop those claims, including an evidentiary hearing, before any final ruling on the claims. Indeed, on motion for summary judgment, the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to the non-moving party (generally the petitioner). Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986).

---

2. The Federal Rules of Civil Procedure apply in habeas proceedings, and it is important to note that the ordinary civil rules apply in the absence of established habeas rules or procedures. Fed. R. Civ. P. 81 (a)(2).

However, in opposing summary judgment/adjudication, like the ordinary civil litigant who will bear the burden of proof at trial, petitioner must point to the material and disputed facts which will preclude summary judgment. Id. *It is insufficient for petitioner to argue that there are disputed facts without proferring any evidence of those facts.* "[If a motion for summary judgment is made] [petitioner] will then be required to produce some contrary proof indicating that there is a genuine issue of fact to be resolved by the District Court or to explain his inability to provide such proof." Blackledge v. Allison, 431 U.S. at 80-81, 97 S.Ct. at 1632-1633. While the court does not task petitioner with proving his case at this juncture, petitioner must point to *some probative, colorable* facts which preclude entry of judgment. "If the evidence [put forth by the non-moving party] is merely colorable, or is not significantly probative , summary judgment will be granted." Anderson v. Liberty Lobby, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2511 (1986). It is not enough for petitioner to merely hope that discovery will turn up something which can be put forward at a factual hearing.

Having detailed the procedural requirements facing the parties and the court, the court turns to the substantive issues.

I. PRETRIAL ISSUES

A. Claim XXV: Prosecutor Improperly Used Peremptory Challenges to Exclude Jurors With Reservations About Capital Punishment

Petitioner cites to the well known case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) to establish the proposition that the prosecutor may not utilize his peremptory challenges in such a fashion that non-Witherspoon excludables were nevertheless excluded from the jury. Witherspoon, and its companion case, Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985), do not stand for such a proposition, and it has been rejected on numerous occasions.

> Witherspoon/ Witt stands for the following proposition: A prospective juror may not be excused for her views concerning capital punishment unless those views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. Wainwright v. Witt,

> 469 U.S. 412, 420, 105 S.Ct. 844, 850, 83 L.Ed.2d 841 (1985).

Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992). However, it is clear that the holdings of those cases apply only to excusals *for cause*, and have nothing to do with peremptory challenges.

> However, "we have consistently held that in capital cases peremptory challenges may be used to exclude those [prospective jurors] who express hesitancy about imposing the death penalty but whose exclusion for cause is forbidden by Witherspoon." United States v. Leslie, 783 F.2d 541, 552 n. 18 (5th Cir. 1986)(en banc), vacated on other grounds, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987), aff'd in relevant part, 813 F.2d 658 (5th Cir. 1987); see also Sonnier v. Maggio, 720 F.2d 401, 406-07 (5th Cir. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1331, 79 L.Ed.2d 726 (1984); Jordan v. Watkins, 681 F.2d 1067, 1070 & n. 2 (5th Cir. 1982).

Andrews v. Collins, 21 F.3d 612, 628 (5th Cir. 1994). See also Brown v. Dixon, 891 F.2d 490, 497-498 (4th Cir. 1989) and Justice O'Connor's concurring opinion in the denial of certiorari in Brown v. North Carolina, 479 U.S. 940, 107 S.Ct. 423-424 (1986); Dobbert v. Strickland, 718 F.2d 1518, 1525 (11th Cir. 1983).[3]

For the reasons discussed above, the court recommends that this claim be dismissed.

B: Claim XXVI: Six Pro-death Jurors Should Have Been Removed

Petitioner argues violations of the Fifth, Sixth, Eighth and Fourteenth Amendments because six pro-death jurors (Heard, Vandermoon, Din, Doran, Chiribel and Brandstad) should have been removed for cause. However, none of these prospective jurors actually sat on petitioner's jury. (RT 5352-5353.) Petitioner also did not exhaust all of his peremptory challenges. Morris, 53 Cal.3d at 184-185, 279 Cal.Rptr. at 736.

In Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273 (1988),

---

3. The Ninth Circuit has not ruled on this issue to the court's knowledge.

the district court erroneously refused to dismiss a juror for cause. Although the defendant argued that the trial court's error violated his Sixth and Fourteenth Amendment right to an impartial jury and his Fourteenth Amendment right to due process by requiring him to use a peremptory challenge he otherwise would not have needed to use, the Supreme Court did not reverse his conviction. It reasoned, first, that the right of peremptory challenge is not constitutional, Ross, 487 U.S. at 88, 108 S.Ct. at 2278, and second, that Ross received and used all the peremptory challenges to which Oklahoma entitled him, concluding that "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." Id. at 89, 108 S.Ct. at 2279. The defendant did receive the peremptories to which he was entitled under state law, and exercised them to remove the suspicious juror. As a consequence, the offending juror did not sit on the jury that convicted him. Ross, 487 U.S. at 85-86, 108 S.Ct. at 2276-77. Therefore, the court held that the "compulsion" to use a peremptory challenge to unseat a juror that defense counsel believes should have been removed for cause does not state a federal constitutional claim.

However, in United States v. Martinez-Salazar, __F.3d__, 1998 WL 276138 (9th Cir. 1998), the Ninth Circuit limited Ross to the Sixth Amendment context, and held that the "compulsion" to use a peremptory challenge for a juror that should have been challenged for cause rose to the level of a Fifth Amendment violation. Such a ruling does not aid petitioner for two reasons. First it is a new rule which cannot be applied to petitioner's case. By virtue of reading the dissent in Martinez-Salazar, it cannot be said that all reasonable jurists would agree that the Ninth Circuit's holding is dictated by precedent. See Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989). More importantly, petitioner was not compelled to utilize a peremptory challenge for a juror who should have been excused for cause. *Petitioner did not use all his peremptories.*

If a party fails to utilize all available peremptory challenges, and a previously challenged-for-cause juror remains on the jury, the party has no valid issue on appeal for failure of the trial court to strike the challenged juror for cause. United States v. Hardy, 941 F.2d 893, 897 (9th Cir. 1991). If there is no federal error, there is perforce no error applied to the state courts on habeas corpus review. See Siripongs v. Calderon, 35 F.3d 1308, 1322 (9th Cir. 1994) (refusing to consider the

propriety of a failure to excuse for cause in a capital case in light of the fact that defense counsel had not used all peremptories). If such is the rule when a juror potentially challengeable for cause remains on the jury, the rule must also apply with double force to the failure to use all peremptories when the juror at issue does not sit on the jury. Under the present circumstances where all challengeable jurors did not sit, and petitioner had peremptory challenges remaining, petitioner could not claim that he was "compelled" to "waste" a peremptory challenge in the slightest by the failure to unseat the jurors for cause.

In the instant case, not only did petitioner not use all of his peremptory challenges but none of the allegedly pro-death jurors sat on the jury. Under these circumstances, this claim should be dismissed pursuant to Hardy/Siripongs.

II. GUILT PHASE ISSUES

A. Claims I & II: Relating to Plea Agreements of Barrett and Eckstrom

Claims I & II: Testimony of Barrett and Eckstrom Improperly Admitted

Petitioner alleges that the testimony of Avette Barrett and Allison Eckstrom was improperly admitted because it was coerced and false. Petitioner argues that the prosecutor negotiated plea agreements with Eckstrom and Barrett which required that they give specific testimony implicating petitioner without regard for the truth or falsity of the testimony. The background of Claims I and II is as follows.

On September 18, 1985, a criminal complaint was filed in Sierra County Justice Court charging Avette Barrett with theft of Rickey Van Zandt's vehicle and with aiding petitioner in avoiding arrest for the murder of Van Zandt. (CT 15.) On January 21, 1986, Barrett signed a plea agreement. A copy of this agreement is located at pages 2567-2569 of the Court Transcript. The agreement contained the following provisions: 1) that the representation Barrett made to law enforcement that she did not personally inflict any injuries upon Rickey Van Zandt was true; 2) the District Attorney's stipulation to her release on her own recognizance after completion of the preliminary hearing; 3) agreement to waive time; 4)

availability of Barrett for service of subpoena or taking of a polygraph examination; 5) that she testify truthfully and completely at all proceedings including the preliminary examination and the trial; 6) that she would not exercise her right to remain silent; 7) that she take a lie detector test at anytime prior to June 1986 and pass it on all points material to the murder case against petitioner; the prosecution could not use any statements made during the test against her in any subsequent prosecution; 8) that she keep the district attorney apprised of her address. The agreement would be void if it were to be determined that the representation in #1 was not true, or if Barrett did not comply with her obligations in #s 2-8. It was further agreed that if she complied with the above terms, the district attorney would move to dismiss the charges against her so long as she plead guilty to a felony violation of Cal. Veh. Code § 10851.

Just prior to trial, Barrett's plea agreement was modified to delete the requirement regarding the truth of the representation that she had not personally taken part in the infliction of personal injuries on the victim. (RT 4214.)

A copy of Eckstrom's agreement is located at pages 2570-2571 of the Court Transcript. Pursuant to this agreement, signed January 21, 1986, Eckstrom would receive transactional immunity from prosecution for murder and lesser charges if 1) the representation she made that she did not personally inflict any injuries on Rickey Van Zandt was true; 2) she abided by the terms of her own recognizance release; 3) she continued to waive time; 4) she made herself available for a subpoena to attend the proceedings related to petitioner's case; 5) she testified truthfully; 6) she did not exercise her right to remain silent. If she complied with these terms, all charges would be dismissed at the conclusion of petitioner's trial. There was no requirement that she take a lie detector test. The term of her plea agreement regarding her representation that she did not personally inflict any injuries on Rickey Van Zandt was ***not*** removed from her plea agreement.

Petitioner makes the following claims in connection with the testimony of Barrett and Eckstrom: 1) the trial court improperly refused questioning regarding their polygraph tests; 2) the plea agreements violated Brady v. Maryland, 373 U.S. 83 (1963); 3) the prosecutor failed to disclose evidence that Eckstrom was treated by a mental health expert based on her testimony that her memory of events was improved by dreams;

4) undisclosed benefits for their testimony in violation of United States v. Bagley, 473 U.S. 667, 682 (1986); 5) (and perhaps the most significant part of the claim) that the plea agreements induced Barrett and Ekstrom to give false testimony; 6) that both trial and appellate counsel were ineffective for failing to raise the issues, and that trial counsel was ineffective in the Eckstrom matter for failing to investigate her propensity for violence. The court will first examine the polygraph claim.

Polygraph Evidence

As to Barrett, petitioner complains that the trial court refused to permit inquiry into whether or not she had been required to take a polygraph pursuant to the prosecutor's plea agreement and, if so, what the testing results were. As for Eckstrom, petitioner alleges that prior to trial, she took and failed a polygraph examination. Petitioner argues that the trial court's failure to permit inquiry concerning her failure of a polygraph test pursuant to her immunity agreement was unconstitutional.

The record indicates that during trial, the court conducted a brief hearing regarding the admissibility of evidence regarding the lie detector tests. Petitioner's counsel argued that Eckstrom took a lie detector test and did not pass it. He further argued that Barrett refused to take such a test on the advice of counsel. (RT 3892). The prosecutor informed the court that Barrett had not taken a lie detector test because she was pregnant. (RT 3894-95). The prosecutor did not deny that Eckstrom took a lie detector test. Instead, he argued that such evidence was inadmissible under state law. (RT 3894). The court ordered that all evidence regarding the polygraph tests was inadmissible pursuant to Cal. Evid. Code § 351.1(a), which prohibits the admission of any polygraph examination evidence which has not been the subject of stipulation. (RT 3895).

It is correct that California law to this day prohibits the introduction of unstipulated evidence regarding polygraph examinations. The California Supreme Court rejected this claim as follows:

> We need not consider defendant's challenges because the ruling is sustainable regardless of the effect of Evidence Code section 351.1. Defendant's offer of proof was simply that Eckstrom took a lie detector

> test and did not pass it. Because defendant did not offer to prove the polygraph's acceptance in the scientific community, the evidence was properly excluded. As we said in People v. Harris (1989) 47 Cal.3d 1047, 1094-95 [255 Cal.Rptr. 352, 767 P.2d 619]: "Absent an offer of proof that the polygraph is now accepted in the scientific community as a reliable technique, the evidence was presumptively unreliable and inadmissible." Having failed to make the proper offer of proof, defendant is in no position to assign error in the trial court's ruling.

People v. Morris, 53 Cal.3d at 193, 279 Cal.Rptr. at 742.

Respondent did not move to dismiss Claims I and II on the grounds that both were barred under a procedural default doctrine, i.e. barred because of an inadequate offer of proof at trial. Therefore, the court reaches the merits of the claim.[4]

It appears from the record regarding this matter above that Barrett did not take a polygraph exam but Eckstrom probably did. Therefore, with respect to Barrett, the issue becomes whether petitioner was improperly barred from cross-examining her regarding this term of her plea agreement. With respect to Eckstrom, the issue becomes whether the results of the polygraph should have been admitted and whether petitioner should have been permitted to cross-examine her regarding them. Whether or not taking a polygraph examination was part of her plea agreement is not material to the analysis of this claim.

The record indicates that Barrett did not take the polygraph examination because she was pregnant. Petitioner has offered no evidence indicating that this was an improper reason for her failure to take the polygraph examination. Therefore, the only evidence withheld from the jury was that although the polygraph examination was a term of her plea agreement, she did not take one because she was pregnant. This court cannot find that this information was particularly probative. It would not have assisted the jury's assessment of Barrett's credibility.

---

4. An argument that the Claims were barred by the procedural default doctrine would be problematic in that the issue of the offer of proof might be considered intertwined with the merits of the claim thereby negating the "independent" (procedural) grounds for application of procedural bar.

Under these circumstances, the refusal to permit petitioner's counsel to question Barrett regarding this portion of her plea agreement did not violate fundamental fairness.

Even assuming the pregnancy excuse was a ruse to avoid taking a "truth" test that Barrett thought she might fail, and that counsel could have developed such impeachment, for the reasons pertinent to Eckstrom set forth below, petitioner has no cognizable due process claim, and in any event, such a claim is barred by the Teague new rule doctrine.

The court now turns to the polygraph evidence as it pertains to Eckstrom.

Whether polygraph evidence may be admitted in a state trial is a matter of state law. Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994)(citing Bashor v. Risley, 730 F.2d 1228, 1238 (9th Cir. 1984). As discussed above, at the time of petitioner's trial, California law prohibited the admission of unstipulated polygraph evidence. Thus, the issue becomes whether the California polygraph law itself violates fundamental notions of due process, and whether such a finding could be retroactively applied to petitioner's case.

Up until recently, the Ninth Circuit followed a similar rule to that of California . However, in U.S. v. Cordoba, 104 F.3d 225 (9th Cir. 1997), the Ninth Circuit held that the per se rule excluding the admission of unstipulated polygraph evidence was effectively overruled by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993). The Ninth Circuit stated,

> We have long expressed our hostility to the admission of unstipulated polygraph evidence. See United States v. Givens, 767 F.2d 574, 585-86 (9th Cir.), cert. denied, 474 U.S. 953, 106 S.Ct. 321, 88 L.Ed.2d 304 (1985); United States v. Demma, 523 F.2d 981, 987 (9th Cir. 1975)(en banc). This antipathy culminated in the adoption of a "bright line rule" excluding all unstipulated polygraph evidence offered in civil or criminal trials. See Brown v.Darcy, 783 F.2d 1389, 1396 n. 13 (9th Cir. 1986).

United States v. Cordoba, 104 F.3d at 227.[5]

---

5. In Daubert, the Supreme Court held that Federal Rule of Evidence 702, governing the admission of scientific expert testimony, superseded Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923), which

Importantly, Cordoba only decided that it would bring the Ninth Circuit into line with several other circuits in that a defendant should be allowed to *attempt* to obtain admission of polygraph evidence. It did not decide that such evidence was fundamental to the ascertainment of truth in the criminal proceeding. Indeed, Cordoba was only interpreting the Federal Rules of Evidence after Daubert. The parties have cited to no case, nor can the court discover any reported federal case which holds that the exclusion of polygraph evidence in the guilt/innocence phase of a case is a fundamental violation of due process– the type of error that must be present to warrant habeas relief. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). If anything, the Supreme Court has ruled to the contrary. See United States v. Scheffer, __U.S.__, 118 S.Ct. 1261 (1998) (per se rule against admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of a defendant to put on a defense). Indeed, the Supreme Court has held that in jurisdictions where polygraph evidence is not permitted in the liability portion of a case, failure to disclose that a witness failed a polygraph is not even "material" for Brady [v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)] purposes. Wood v. Bartholomew, 516 U.S. 1, 116 S.Ct. 7 (1995).

The case of Rupe v. Wood, 93 F.3d 1434 (9th Cir.1996) superficially supports petitioner's position, but upon examination, the case is inapplicable to petitioner's claim. In Rupe, the Ninth Circuit held that the exclusion during the

---

had required scientific testimony to be generally accepted in the relevant scientific community to be admissible. Daubert, 509 U.S. at 584-87, 113 S.Ct. at 2792-93. The Supreme Court stated that under Rule 702, when

> [f]aced with a proffer of expert testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) [footnote omitted], whether the expert is proposing to testify to 1) scientific knowledge that 2) will assist the trier of fact to understand or determine a fact in issue. [footnote omitted.] This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93.

penalty phase of an accusing accomplice's polygraph results indicating that the accomplice was lying about his culpability violated the Eighth and Fourteenth Amendments. The court is also bound by the determination that for penalty phase purposes, and based on cases pertinent only to the penalty phase of a capital prosecution, the holding regarding exclusion of polygraph evidence was not a new rule in violation of Teague v. Lane, 489 U.S. 290, 109 S.Ct. 1061 (1989).

Rupe does not apply here for a myriad of reasons. Most significantly, Rupe only applies to the penalty phase of a capital prosecution, and not the guilt phase. Petitioner herein has made no direct or indirect claim/argument about polygraph evidence being pertinent to the penalty phase. Rupe took pains to emphasize that "relaxed standards govern the admission of mitigating evidence during the penalty phase of a death penalty trial." Id. At 1439. The cases relied upon by Rupe for the proposition that it was error to exclude the polygraph evidence were penalty phase mitigation evidence cases. As just observed above, the parties cite no cases, and the court is not aware of any, that find a due process error for failure to permit unstipulated polygraph evidence in the liability portion of a trial. Petitioner cannot establish a due process violation.[6]

Even assuming to the contrary of the above conclusion, petitioner would not be permitted to establish that preclusion of polygraph evidence in his case worked a violation of due process. The fact that petitioner had an opportunity to present evidence on the reliability of polygraph evidence, but did no do so brings into play the case of Keeney v. Tamayo-Reyes, supra. As noted by the California Supreme Court, petitioner presented no offer of proof concerning the reliability of the polygraph evidence itself; he did not attempt to overcome the statutory prohibition against its use. The federal habeas proceeding

---

6. Even if the amended petition herein could be construed to wrench an argument from Claims I and II, that preclusion of the polygraph evidence in the guilt phase tainted the penalty phase because of the "lingering doubt" rationale, such an argument is foreclosed by Grigsby v. Blodgett, 130 F.3d 365, 370-71 (9th Cir. 1997) (quoting from Franklin v. Lynaugh, 487 U.S. 164, 172-74, 108 S.Ct. 2320, 2326-28 (1988) ("lingering doubts are not germane to mitigation because they are "not over any aspect of petitioner's character, record, or a circumstance of the offense'").

cannot be used to develop evidence that petitioner had an opportunity to present in state court, but did not do so.

At this point, the court will assume arguendo that preclusion of polygraph evidence at the guilt phase could be a due process error, and that petitioner would be allowed to develop the reliability of such evidence at this time. Even if this is so, petitioner could not benefit from the application of a due process rule involving the admission of polygraph evidence at the liability portion of a trial because the rule would be considered "new" for purposes of Teague v. Lane.

Whatever the correctness of the holding that Teague does not preclude polygraph evidence at the penalty phase, the issue is entirely different for purposes of this guilt phase claim. In order to determine whether the Ninth Circuit's holding in Cordoba potentially permitting admission of polygraph evidence should be applied to this case as a new rule of law this court must apply Teague v. Lane, 489 U.S. 290, 109 S.Ct. 1061 (1989). The court first states the elementary principles about Teague:

1. The court may raise the issue sua sponte - "Thus, a federal court may, but need not, decline to apply Teague if the State does not argue it." Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948 (1994).

2. The critical time which determines whether an application of law would be retroactive for Teague purposes is the time after *direct* review by the state supreme court on which the period for filing for certiorari in the U.S. Supreme Court lapses, or at the time that certiorari is denied. Allen v. Hardy, 478 U.S. 255, 258, 106 S.Ct. 2878 (n.1) (1986). If a rule of law is announced after the "critical time," a petitioner may not assert the new rule for application in his case. Petitioner's direct review became final when the California Supreme Court denied his petition for rehearing on March 28, 1991. Thus, any rule applicable to petitioner's case must have been announced prior to this date.

3. A petitioner may not rely on creation of a new rule in his case for application in his case. Teague, 489 U.S. at 315-316, 109 S.Ct. at 1078.

4. A new rule as defined by Teague is one that was not dictated by precedent at the time it is to be applied in the case at issue, i.e., at or before the "critical" time. Caspari, supra; the new rule may be applied if it falls within the two narrow exceptions of Teague--the act at issue has been decriminalized

by the new rule; the new rule requires observance of procedures that are implicit in the concept of ordered liberty. Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112 (1993).

Here, Daubert was decided in 1993 and Cordoba in 1997, both after petitioner's conviction became final. The new rule permitting at least the attempt to introduce polygraph evidence is clearly a new rule in light of the previous law flatly prohibiting admission of any such evidence. Given the very words of Cordoba, the rule permitting the attempt to establish the validity of polygraph evidence at the liability portion of a trial was not dictated by precedent prior to 1997. Hence unless an exception applies, the polygraph evidence rule established by Cordoba is not subject to retroactive application in petitioner's case.

Turning to the two Teague exceptions, the new polygraph evidence rule is not relevant to the first exception. It has nothing to do with the decriminalization of an act that was once the subject of criminal penalties Consideration of the second exception merits little more discussion. Given the still dubious status of polygraph evidence, petitioner cannot establish that introduction of polygraph evidence is implicit in the concept of ordered liberty. In determining whether the second exception applies, the court considers whether the old rule allowed for "an impermissibly large risk that the innocent will be convicted." Teague, 489 U.S. at 312, 109 S.Ct. at 1076. One need only look to Cordoba's final summation on polygraph evidence to understand that such is not the case.

> "With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in Brown, polygraph evidence has grave potential for interfering with the deliberative process."

Cordoba, 104 F.3d at 228.

This is hardly the type of ringing endorsement that would be needed to find that admission of polygraph evidence is implicit in the ordered concept of liberty. Claims I and II, insofar as they rely on arguments about cross-examination of Barrett and Eckstrom on polygraph issues, are without merit.

Mental Health Experts

Petitioner argues that Eckstrom's testimony that her

memory of events concerning the homicide had been improved by dreams suggested that she was treated by a mental health expert who hypnotically induced the memories.[7] Petitioner argues that the prosecutor failed to disclose this evidence.

Petitioner has offered no evidence to support the speculation that Eckstrom was treated by a mental health expert who hypnotically induced her memories. As discussed earlier, in this summary judgment proceeding it is petitioner's burden to point to the material and disputed facts which preclude summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 324 , 106 S.Ct. 2548, 2553 (1986). It is insufficient for petitioner to argue that there are disputed facts without proferring evidence of those facts.

For example, petitioner has presented no declaration from Eckstrom stating that she was actually hypnotized. Rather, petitioner's claim is based solely on his assertion that she "might" have been hypnotized. Such an allegation is insufficient to withstand summary judgment.

Undisclosed Benefits

Petitioner argues that both Eckstrom and Barrett received undisclosed benefits for their testimony. A Brady violation occurs when the government withholds from a defendant material, exculpatory evidence. United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995). And there can be no doubt that failure to disclose an immunity agreement, or its terms, can be a violation of due process. Giglio v. United States, 405 U.S. 150, 925 S.Ct. 763 (1972) -- Evidence is "material only if there

---

7. Q: Didn't you testify at the preliminary hearing that there was no discussion while Rickey was inside the grocery store about when, where, or how he should be killed?

A: I didn't remember it then.

Q: But you remember it now?

A: Yes, sir.

Q: Has anything happened to improve your memory since then?

A: Yeah, I had a couple of dreams.

Q: You had a couple of dreams?

A: They were real.

Q: They were real? And that's helped to refresh your recollection about these things?

A: Yes, sir. (RT 3948-3949.)

is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985).

Petitioner has not alleged what undisclosed benefits he believes Eckstrom or Barrett received. Because this claim is speculative and unsupported, the court recommends that it be dismissed.

Coercive Plea Agreement

The government has the right to use as a witness any person to whom it has granted immunity from prosecution. United States v. Yarbourgh, 852 F.2d 1522 (9th Cir. 1988). Accomplice plea agreements do not violate due process. Gallego v. McDaniel, 124 F.3d 1065, 1078 (9th Cir. 1997); see also the often cited United States v. Dailey, 759 F.2d 192 (1st Cir. 1985). In most witness immunity cases, the curative effects of cross examination are considered adequate to protect a defendant's due process rights. Yarbourgh, 852 F.2d at 1538. Such plea agreements with accomplices will be upheld if the jury is informed of the exact nature of the agreement, defense counsel is permitted to cross-examine the accomplice about the agreement, and the jury is instructed to weigh the accomplice's testimony with care. Yarbourgh, 852 F.2d at 1537, citing United States v. Dailey, 759 F.2d at 198. Plea agreements that require the accomplice to tell the truth in order to secure the benefits of the plea agreement, are not improper. Gallego, supra. However, where the terms of the accomplice plea agreement are found to be unduly coercive, e.g., predicating government's performance of the accomplice plea agreement on a conviction of the target defendant, the court will reverse the conviction of the target defendant obtained by use of accomplice testimony. See United States v. Redding, 881 F.2d 575, 577 (8th Cir. 1989). Finally, the terms of the accomplice plea agreement must be made known to counsel for the target defendant. Giglio v. United States, 405 U.S. at 153-155, 92 S.Ct. at 765-766 (1972).[8/]

---

8. Any claim by petitioner that the plea agreements were inherently suspect because they were made with accomplices must also be rejected.

As discussed above, at the time that Barrett and Eckstrom testified at the preliminary hearing, both of their plea agreements contained a provision providing that neither had inflicted physical harm on Van Zandt. This provision was removed from Barrett's plea agreement prior to trial, but not from Eckstrom's plea agreement. During trial, these plea agreements were discussed on direct and cross-examination with Barrett and Eckstrom.[9/]

The requirement in a plea agreement that a witness testify truthfully "negates any inference of inducement to testify falsely." Dailey, 759 F.2d at 197. While this was a term of both Barrett and Eckstroms' plea agreements, both also agreed at one time upon pain of agreement rejection that they had not inflicted any personal injury on Van Zandt. While the motive

---

The plea agreements were disclosed to the jury, petitioner's counsel was permitted to cross-examine Barrett and Eckstrom regarding the agreements, and the jury was instructed to weigh the testimony of the accomplices with care. (RT 4893.)

9. At the beginning of Eckstrom's direct examination, the prosecutor asked her to describe her plea agreement. (RT 3788.) She testified, "An agreement, if I lie or anything like that, I--the agreement will stop. I'll get charged with everything." (RT 3788.) She further testified that if she did not lie she would receive full immunity. (RT 3788.) During cross-examination of Eckstrom, petitioner's counsel asked her questions regarding the agreement. (RT 3943-3945.) In response to counsel's questions, Eckstrom testified that she had signed a written agreement. (RT 3944.) She also testified that she had been previously charged with murder but that charge had been dropped. (RT 3944.) She testified that she had been charged with other offenses related to the murder, but they had been dropped as well. (RT 3945.)

As for Barrett, the prosecutor began his examination by asking her to describe her plea agreement. (RT 4001.) She answered that if she testified truthfully she would enter a plea to grand theft auto, a felony. (RT 4001.) On cross-examination, petitioner's counsel asked her questions regarding who would determine whether or not she was telling the truth. (RT 4052.) Petitioner's counsel also questioned her about the first plea agreement where she agreed that she did not personally inflict any injuries on Van Zandt. (RT 4057-4058, 4061-4062.) She testified that in May 1987 that term of her plea agreement was withdrawn, but not at her request. (RT 4062.) He asked her additional questions regarding the terms of her plea bargain. (RT 4062-4066.) He also questioned her extensively regarding the truthfulness of her testimony. (RT 4221-4224.)

behind such a term was to ensure that the accomplice not be as guilty as the target, and hence the requirement that the preliminary statements exculpating themselves from murder liability were true, a plea agreement requiring such specific testimony is improper. If the truth of the matter actually does implicate the accomplice, the accomplice will be deterred from telling the truth because such a truthful rendition will void the plea agreement.

Because the provision in Barrett's plea agreement that she had not participated in the physical harm to Van Zandt had been removed from her plea agreement, thereby freeing her to tell the truth, if it differed from her previous statements, the court will not find that the initial insertion of the offending provision violated petitioner's constitutional rights. Barrett never once in her pre-trial statements gave any indication that she had struck any blows against Van Zandt. Barrett was in the same position as any potential accomplice who denied active participation in the crime at issue to the police or in preliminary court proceedings. What "pressure" there is to conform one's trial testimony with pretrial statements is inherent in every accomplice plea agreement where the accomplice must tell the truth or forfeit the benefits of the plea agreement. As noted from the cases cited above, these plea agreements do not violate due process.

Of course, Eckstrom's plea agreement contained the "no harm" clause throughout all proceedings. The California Supreme Court did not reach the issue of whether the inclusion of the "no harm" clause in the plea agreements was improper, but decided the case on prejudice grounds. Finding that the provision violates due process in the abstract, this court will do likewise.

In Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 1721-22 (1993), the Supreme Court held that a habeas petitioner is not entitled to relief unless the record indicates that the trial error "'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946)). The Supreme Court has more recently focused the harmless error standard when it held in O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992 (1995), that if the federal judge reviewing the habeas action had "grave doubt" as to the injurious effect of the error, the ruling must go in favor of finding the error harmful.

The court completely agrees with the conclusion of the state supreme court that petitioner suffered no prejudice.

> The prosecution's case did not depend substantially on Eckstrom's accomplice testimony. Defendant's several detailed pretrial admissions of guilt were the cornerstone of the case against him. The accomplice testimony served primarily to supply details and to clarify occasional vagueness in defendant's admissions. In view of the abundant "corroborating circumstances" showing that Eckstrom was testifying truthfully, including defendant's pretrial admissions, Barrett's testimony, and the physical evidence, there was no reversible error in allowing the testimony.

People v. Morris, 53 Cal.3d at 191-192, 279 Cal.Rptr. At 741.

Moreover, petitioner has not shown that the inclusion of the "no harm" clauses caused a change in testimony from statements previously given by Barrett and Eckstrom that were adverse to petitioner. There is no evidence indicating that prior to the preliminary hearing either Barrett or Eckstrom ever made statements implicating themselves in the actual physical act of killing Van Zandt.[10/] In other words, their version of events regarding their involvement in the actual killing did not change from the time their statements were taken before the preliminary hearing, during the preliminary hearing, or during trial. Although the term of their plea agreements that they did not inflict harm on Van Zandt was improper, there is nothing indicating that they ever changed their testimony to comply with this term. And while it is true that at trial both Eckstrom and Barrett contradicted some of their earlier statements, it remains a fact that neither of the two witnesses at any time related that they had actually caused harm to Van Zandt.[11/]

---

10. Eckstrom and Barrett were questioned at trial regarding statements they made to law enforcement personnel during the initial investigation of the murder. In none of these statements did either Eckstrom or Barrett state that they had killed Van Zandt. In opposing the summary judgment motion, petitioner has provided no evidence to the contrary.

11. At the preliminary hearing, Eckstrom testified that petitioner struck Van Zandt 5 or 10 times when he went down the hill after Van Zandt. (RT 3831.) At trial, she testified that she remembered petitioner striking Van Zandt 3 times. (RT 3831.) At the preliminary hearing, Eckstrom testified that there was no discussion while Van Zandt was in the store about

Petitioner concludes for both Claims I and II (as he does for several of the claims in this petition) that "[t]he failure of trial and/or appellate counsel to raise and litigate these issues constitutes prejudicial ineffective assistance of counsel without

---

when, where, or how he should be killed. (RT 3948.) At trial, she testified that petitioner discussed stabbing Van Zandt in the head while he was in the store. (RT 3948.) At the preliminary hearing, she testified that while waiting for Van Zandt in the van, either Barrett or petitioner said, "Let's kill him." (RT 3940.) At trial, she testified that petitioner made this statement. (RT 3950-3951.) In a pretrial statement to Steve Peterson, Eckstrom stated that it was her and petitioner's idea to hit Van Zandt with a rock. (RT 3970.) At trial, she denied that it was her idea. (RT 3969.) While Eckstrom may have attempted to distance herself from earlier testimony indicating her greater involvement in the planning and encouragement of the killing, none of these changes in testimony went to whether she participated in the killing of Van Zandt.

Barrett testified at the preliminary hearing that she could not remember if anyone said anything about hurting or killing Van Zandt while he was in the store. (RT 4078.) At trial, she testified that she suggested that, while Van Zandt was in the store, he be killed. (RT 4077.) She testified at trial that while Van Zandt was in the store, petitioner said that he did not want to kill anyone. (RT 4078.) At the preliminary hearing, Barrett testified that when petitioner returned to the van while fishing with Van Zandt, she handed him a knife. (RT 4086.) At trial, she testified that petitioner got the knife out himself. (RT 4086.) At the preliminary hearing, Barrett testified that petitioner did not tell her what he was going to do with the knife. (RT 4088.) At trial, she testified that he told her that he was going to use it to stab Van Zandt. (RT 4087.) Again, while Barrett may have changed some of her previous testimony, none of these changes went to whether she or her sister actually participated in the actual killing of Van Zandt.

At one point during the preliminary hearing, the judge called for a five minute recess. At that time he told the prosecutor that he may want to go over the terms of the plea agreement with Barrett in that she was to fully cooperate in answering the district attorney's questions. (CT 853.) Prior to that time, some of her answers had been unresponsive. However, the questioning at that time did not go to who did the actual killing. Rather, the questioning was focused on the conversation that took place between Barrett, Eckstrom and petitioner while Van Zandt was in the store. The trial court's comment to the prosecutor in this context does not suggest that Barrett was being untruthful when she later testified that petitioner killed Van Zandt.

any informed justification."

Amended Petition at 17 and 19. Evidently this "checklist" conclusion is designed to preserve a claim that is not stated with any specificity. Obviously, the issue of the propriety of the accomplice plea agreements were raised at trial and litigated before the California Supreme Court. The court has no idea of the precise issues petitioner's trial counsel attempt to preserve by their talismanic conclusion. Moreover, petitioner also concludes, without any factual presentation, that "[t]he failure of trial counsel and/or appellate counsel to investigate and present background evidence showing Ms. Barrett's propensity for violence, manipulation, domination and untruthfulness, and other relevant characteristics, was prejudicial ineffective assistance of counsel, without any tactical justification." Amended Petition at 15-16. A similar claim was made for Eckstrom. As respondent notes, the failure of petitioners's counsel to allege any facts or legal theory of admissibility for the non-existent facts with respect to the speculated conclusion, or present any factual material in opposition to summary judgment, dispositively requires that the conclusions be ignored.[12/] Again, petitioner must allege facts that point to the "real possibility" of constitutional error, Blackledge v. Allison, supra, and that "'[h]abeas corpus is not a general form of relief for those who seek to explore their case in search of its existence.'" Calderon v. Nicolaus, supra.

---

12. Petitioner makes no factual or legal mention of these conclusions in her opposition to summary judgment. The court further notes that the allegations concerning the failure to investigate the backgrounds of Barrett and Eckstrom were further contained, but not factually developed, in Claim XXXVII (C)-- a claim that has been procedurally barred. Subclaim C relates that Barrett and Eckstrom were "skilled manipulators" [of people], and that previous abuse in the home had made them "pathologically dishonest in their dealings with others." Amended Petition at 73. Even if the Claim were not procedurally barred, counsel in neither her Amended Petition nor in opposition to summary judgment presents any facts or discusses the evidentiary problems with introduction of the conclusions. Petitioner may not simply make bold assertions without any factual basis, ask for discovery and investigation on the foundationless claims, and hope that something turns up for evidentiary hearing. This is not an issue about whether petitioner has received sufficient investigative funds or discovery; it *is* an issue about insufficient opposition to summary judgment in habeas corpus proceedings.

B. Claims III & V: Failure to Disclose Consideration Brooks and Wharton Received for Testimony Plot

In both Claims III and V, petitioner alleges that the prosecutor failed to disclose to the defense evidence of benefits conferred upon witness, and former prisoner, Anthony Brooks in exchange for his testimony implicating petitioner in a supposed escape plot.[13/] Petitioner also refers to witness Wharton, and former prisoner, in Claim V, and the alleged improper consideration he received for testifying to petitioner's *admitted* statement to Wharton that petitioner had beaten Van Zandt. Petitioner's inculpatory statement to his fellow prisoner was also heard and brought to the attention of prosecuting authorities by another inmate, Weaver.

Petitioner argues, again *without any factual support*, including any factual support that stood as the basis for making the allegation in the first place, that, in exchange for their testimony, both inmate witnesses Brooks and Wharton were going to be freed from incarceration and were freed well in advance of their anticipated release. Petitioner further alleges that the deal was not disclosed to the defense in violation of Brady v. Maryland and Giglio v. United States. Of course, as discussed above, if there were *any significant* factual presentation concerning the alleged deals, and the failure to disclose was prejudicial, this court would be bound to allow discovery and hold an evidentiary hearing. Petitioner further alleges that trial and appellate counsel were ineffective for failing to investigate the circumstances under which petitioner was alleged to have made these statements. Petitioner finally argues that such an investigation would have uncovered the fact that petitioner was not "mentally responsible" for making these statements.

---

13. In Claim III, petitioner also alleged violations of the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted the testimony of jailhouse informant, Anthony Brooks, that petitioner had planned to escape from jail while awaiting his trial. The court found this claim procedurally barred. See May 27, 1997, findings and recommendations, p. 22-24. For that reason, it is not addressed in these findings and recommendations.

In the summary judgment motion, respondent refers to the following information from the record. Respondent states that trial counsel sought discovery about alleged deals at trial, and the prosecution stated there were no agreements with the witnesses, Wharton and Weaver. (RT 309.) During a pretrial hearing, Brooks testified that he went into the Colusa County Jail on or around September 17, 1986, to serve a six month sentence for felony sales of narcotics. (RT 143.) Brooks testified that in November 1986 petitioner approached him with the idea of escaping from the jail in Downieville, where they were to be transferred. (RT 144.) Brooks brought this to the attention of authorities a few days later because he was concerned for his own safety. (RT 145.) He was concerned that petitioner might try to escape during transport to Downieville. (RT 145.)

Brooks testified that he received nothing in consideration for his disclosure. (RT 145.) Brooks testified that he served 3 ½ months of his 6 month sentence. (RT 148.) With time credits earned as a result of him being a trustee, his release date was December 29, 1986. (RT 148.)

At a pretrial proceeding, Wharton testified that he was serving a 10 month jail sentence for cultivation and burglary in February 1986. (RT 60.) He testified that while he and petitioner were talking, petitioner made a statement to him. (RT 61.) Wharton testified that inmate Weaver heard petitioner's statement and wrote it down. (RT 61.) Because Wharton had heard it too, he wrote it down as well. (RT 61.) Wharton was given no special consideration for disclosure of this information. (RT 61.) He served a little more than 4 months of his 10 month sentence. (RT 62.) Wharton testified that he was released early after he pursued a motion to modify his sentence. (RT 62.) He pursued this motion before he provided the information regarding petitioner. (RT 63.) Wharton testified that the judge told him that he would release him if he could find a job. (RT 64.) Because Wharton found a job, he was released. (RT 64.)

At trial, Wharton testified that petitioner had told him that he had pounded a guy in the head a number of times and that he was sorry he did it. (RT 3815.) He also testified that he did not volunteer this information to authorities. (RT 3815.) Rather, another inmate (Weaver) had overheard the conversation, reported it to jail authorities, and then the jail authorities contacted Wharton. (RT 3815, 3816, 3820.) Wharton was a

jail trustee before the incident occurred. (RT 3823).

During pretrial proceedings, inmate Weaver testified that Wharton told him that Morris had stated that he had killed a man by bashing his head in with a rock. (RT 52.) Weaver took this information to jail authorities. (RT 52.)

During the trial, *petitioner* testified that he told Wharton that he had killed Van Zandt because he knew it would get back to law enforcement. (RT 4604.) Ostensibly, petitioner was still attempting to make sure that his girlfriend, Barrett, would be exonerated of any murder. Petitioner admitted making the statements to Wharton. (RT 4604.) Petitioner testified that he had discussed with Brooks how easy it would be to escape, but he denied specifically telling Brooks that he wanted his assistance in escaping. (RT 4607.)

The record indicates that the referenced inmates received no consideration for their testimony. In their testimony, they both offered reasonable explanations for their early releases. Petitioner has offered no evidence to support his speculation that these witnesses received undisclosed consideration. In addition, petitioner admitted to making the statement to Wharton and to discussing the escape plot with Brooks. The suggestion that Wharton and Brooks lied in order to obtain leniency is undermined by this testimony. Under these circumstances, the court finds that petitioner has not met his burden in opposing summary judgment. See Celotex, supra. Respondent is entitled to summary judgment with respect to this claim.

Petitioner also argues that counsel was ineffective for failing to discover that petitioner was not "mentally responsible" for the Wharton statements--that he either "confabulated" these statements or did not make them at all. Petitioner offers no support– zero– for the proposition that petitioner suffered from a mental disorder that caused him to make up events or half-truths– counsel's bald conclusion to the contrary notwithstanding.[14/] At trial, petitioner admitted that

---

14. However, even overlooking this flaw for the moment, petitioner forgets about the claims he has made, and whether they are internally consistent. Petitioner claims both that he made up the stories, and reported those stories to the inmates, and inconsistently, that the inmates made up the stories for purposes of obtaining benefits. Petitioner's conclusory presentation for Claims III and V is internally inconsistent and

he had made the statement to Wharton in hopes that it would get back to law enforcement in his apparent effort to shield Barrett from prosecution. If petitioner admitted making this statement, it is unclear what habeas counsel would have had trial counsel do. Under these circumstances, the court finds that petitioner has not met his burden in opposing summary judgment. See Celotex, supra. For that reason, the court recommends that this claim be denied.

C. Challenges to Admission of Evidence: Claims IV, VIII, IX, X, XI, XII

Legal Standard

A writ of habeas corpus is available under 28 U.S.C. § 2254(a) only on the basis of some transgression of federal law binding on the state courts. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), citing Engle v. Isaac, 456 U.S. 107, 119 (1982). It is unavailable for alleged error in the interpretation or application of state law. Middleton v. Cupp, 768 F.2d at 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987).

The Supreme Court has reiterated the standards of review for a federal habeas court. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). In Estelle v. McGuire, the Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit, which had granted federal habeas relief. The Court held that the Ninth Circuit erred in concluding that the evidence was incorrectly admitted under state law since, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." Id. at 68, 112 S.Ct. at 478. The Supreme Court further noted that the standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treatises of the United States (citation omitted)." Id. The Court also stated that in order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness," Id. at 73, 112 S.Ct. at 482, and that "we have defined the category of infractions that

---

fatally flawed. It is demonstrative of the lack of any factual basis that can be believed regarding these claims.

violate 'fundamental fairness' very narrowly." Id. See also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

1. Claim IV: Improper Impeachment with Prior Conviction

Petitioner argues that the trial court improperly admitted evidence of his prior convictions. Petitioner was impeached with the following prior convictions: two kidnaping convictions, attempted rape, assault with intent to commit rape and felony car theft. (RT 4627.) Petitioner argues that evidence of these prior convictions should not have been admitted because they were invalid due to his organic brain damage, and because he often "confabulated" about the events for which he was prosecuted in these prior cases.

In the summary judgment motion, respondent cites several cases in support of his argument that the instant claim is not cognizable in federal habeas. First, respondent cites Luce v. United States, 469 U.S. 38, 43 (1984) and Galindo v. Ylst, 971 F.2d 1427, 1429 (9th Cir. 1992) for the proposition that the mere admission of prior felony convictions for purposes of impeachment is not a constitutional matter. Respondent has misread the holdings of these cases. Rather, Luce and Galindo hold that a defendant *who did not testify* could not appeal the denial of an in limine motion that would have prevented the use of prior convictions for impeachment.

Next, respondent states that there is no constitutional right to attack a prior conviction except for a failure to appoint counsel. Custis v. United States, 511 U.S. 485, 493-498, 114 S.Ct. 1732, 1737-1739 (1994). Respondent has misread Custis. Custis stands for the proposition that, absent a Gideon violation, *a defendant in a federal sentencing proceeding* has no constitutional right to attack collaterally the validity of previous state convictions used to enhance his federal sentence. Gretzler v. Stewart, 112 F.3d 992, 1004 (9th Cir. 1997)(citing Custis, 511 U.S. at 496, 114 S.Ct. at 1738-39). "The underlying state sentences, however, remain subject to attack in state court or through federal habeas review.'" Id.

Nevertheless, despite the paucity of authority cited, this court finds that the court has no jurisdiction in habeas corpus to determine the constitutionality of a prior conviction used for impeachment purposes with the exception of lack of counsel prior convictions. The court has found only one case which

discussed the precise issue. In Howard v. Craven, 446 F.2d 586 (9th Cir. 1971), the Ninth Circuit held that there was a constitutional right for a defendant to attack the use of a prior conviction for impeachment purposes when that conviction had been obtained because the defendant had been unrepresented. The Ninth Circuit based its conclusion on the uniqueness of the constitutional violation. The court declines to extend this rule any further in this case, which does not involve a conviction obtained by an alleged lack of counsel, and whose result was used to impeach petitioner.

The basis for permitting an attack in habeas corpus on the validity of a prior conviction used to enhance a sentence is the legal finding that the defendant is "in custody" with respect to the prior conviction because of the direct effect that the invalid prior conviction has on the present sentence. Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923 (1989). However, the use of a prior conviction during the evidentiary portion of any criminal proceeding for *impeachment* purposes (and not direct evidence of a reason for sentence enhancement), be it guilt or penalty phase, cannot be said to rest on this rationale. Therefore, there is no valid, jurisdictional basis upon which this court could inquire into the constitutional validity of a prior conviction when used for *impeachment* purposes.[15/]

The court *is not holding* herein that the constitutionality of a prior conviction cannot be the subject of inquiry at the penalty phase in a California case when the prior conviction is utilized for the purposes of enhancing punishment, i.e., the conviction is introduced as direct evidence of enhancement pursuant to Cal. Penal Code §190.3. California law permits such an attack. Garcia v. Superior Court, 14 Cal.4th 953, 59 Cal.Rptr. 2d 858

---

15. The court in Howard v. Craven, supra, did not have this jurisdictional issue before it. In addition, there would be no end of mischief worked with little real benefit if a defendant could challenge every prior conviction desired to be used for impeachment on any constitutional ground, including ineffective assistance of counsel. In essence, every criminal case would have to pause while a habeas corpus case was litigated on the prior conviction. The fallacy of such a policy can be seen from the allegations in the present case. Without any submission of evidentiary facts, petitioner desires the validity of every prior conviction utilized in his case to be re-adjudicated because he had the alleged mental "defect" of being prone to "confabulation."

(1997). However, petitioner has not raised that issue herein. The *sole* basis upon which the validity of the prior conviction was challenged in Claim IV, be it guilt or penalty phase, was that the use of the conviction was improper *impeachment*. Use of the convictions as a statutory enhancement factor was not asserted herein, and the court will not raise an unexhausted claim sua sponte.

Even if the court is in error in its jurisdictional finding, and the court analyzes this claim as it would a challenge to the admission of evidence utilizing the Estelle v. McGuire standards set forth above, petitioner's claim should fail. In the amended petition, petitioner alleges that evidence of his prior convictions should not have been admitted because,

> Petitioner's organic brain damage caused him to lose consciousness and lose whole blocks of time for which he could not account. This condition existed from early childhood and still exists to this day. As a result of the organic brain damage, petitioner often admitted actions for which he bore no responsibility. Petitioner confabulated about the events for which he was prosecuted in these prior cases, when in fact he did not commit the acts which he admitted. This confabulation was the direct result of his organic brain damage. Had petitioner's prior attorneys investigated the facts underlying the prior crimes adequately and had they investigated petitioner's mental functioning, they would have uncovered factual defenses to the charges which demonstrated the confabulation on petitioner's part and also established petitioner's factual innocence.

Amended Petition, p. 22.

Petitioner further argues, "In fact, petitioner asserted he was running from prison gangs when he left the San Luis Obispo prison in 1980. The pregnancy of a female friend also played a role in that case. A witness suggested that a female in petitioner's company was exercising control and domination over him during those events." Amended Petition, p. 23.

Petitioner has offered no evidence to support his claim that his prior convictions were invalid. Rather, petitioner rests his claim on unsupported, speculative conclusions. In opposing summary judgment, it is petitioner's burden to point to material and disputed facts which will preclude summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548,

2553 (1986). It is petitioner's burden to point to some probative, colorable facts which preclude entry of judgment. Blackledge v. Allison, supra. Petitioner has not met his burden with respect to this claim.

In his opposition to respondent's motion, petitioner argues that the prior convictions should not have been admitted because the prior convictions were similar to the underlying offense. In United States v. Browne, 829 F.2d 760, 762-63 (9thCir. 1987), the Ninth Circuit set forth a list of factors to be considered by a district court in determining whether or not to admit prior felony convictions: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the defendant's testimony.

While Browne is not dispositive of the issue as it involves the standards applied in federal cases, it does assist the court's assessment of whether the similarity of the prior convictions resulted in a due process violation by their admission. Petitioner was impeached with two kidnaping convictions, attempted rape, assault with intent to commit rape, and a car theft conviction. None of the crimes for which petitioner was on trial herein involved sexual offenses. While petitioner was originally charged with car theft, this charge was later dismissed. Furthermore, petitioner did not deny that he drove Rickey Van Zandt's van to Nebraska. Under these circumstances, the similarity between that prior conviction and the charged crime is not material. The court similarly cannot find that the kidnaping convictions were so similar to the charged crimes that their admission violated due process.

For these reasons, the court recommends that this claim be denied.

2. Claim VIII: Improper Admission of Excluded Evidence

Petitioner alleges that prejudicial evidence that the trial court had excluded was admitted at trial in violation of due process. In particular, petitioner claims that the prosecutor introduced evidence of petitioner's taped statement to Nebraska authorities, which the trial court had ruled inadmissible. The judge then admonished the jury. Petitioner now argues that the

admission of this testimony violated due process and that counsel was ineffective for failing to ensure that this evidence was not admitted.[16/]

Before the tape was played to the jury, the court and counsel listened to the tape outside the jury's presence. (RT 3657.) After hearing the tape, the court stated that the only portion of the tape which should be excised was the portion where petitioner discussed his prior offenses and his incarceration and escape. (RT 3658.) Petitioner's counsel requested the deletion of petitioner's statement that, "And there was some stuff coming down in Sacramento and I had to get out of town. My life was in danger...." (RT 3659.) The court overruled the objection, finding that the statement was not prejudicial and it explained why petitioner left Sacramento. (RT 3659.) The court had earlier ruled that any reference to petitioner leaving town because of some connection to organized crime was not relevant and inadmissible. (RT 3147-3148.)

Petitioner's counsel then requested that the court delete his statement that, "...we caught a ride on Interstate 80 east because I had an opportunity for a job and to change my name and everything, in south shore Tahoe." (RT 3659.) Counsel objected that the change of name referred to the "so-called Mafia threat in Sacramento." (RT 3659.) Counsel then objected to the following passage:

> Deputy Clark: You gave him no assistance? Why was it so hot in Sacramento that you had to leave?
> Petitioner: I was just in some trouble that I shouldn't get in trouble with.
> Deputy Clark: Do you think they were going to kill you?
> Petitioner: Most likely.
> Deputy Clark: Drug dealing?
> Petitioner: It had to do with some underground people.

---

16. Petitioner also argued that the treatment of this issue by the state supreme court amounted to a denial of due process because the state supreme court improperly altered the theories upon which the admissibility of the evidence at trial was adjudicated. This court found that this part of this claim was procedurally defaulted. See May 27, 1997, Findings and Recommendations.

Deputy Clark: Have you ever killed anybody before?
Petitioner: No.
Deputy Clark: Do--you know, the three of us have been in law enforcement for quite a while and have a tendency to find out that people tell us part of a statement, but don't want us--don't want to tell us all of it. Are you leaving anything out?
Petitioner: No. (RT 3660-3661.)

Petitioner's counsel argued that the reference to underground people, drug dealing and petitioner's fear that he was going to be killed painted petitioner as being involved in drugs and organized crime. (RT 3661.) The court overruled the objection, finding that petitioner's statements were "not that prejudicial to the point where it would effect (sic) and enter the deliberative process of the jury." (RT 3662.) Petitioner's counsel then expressed concern that the prosecutor would question petitioner about his connection to organized crime on cross-examination. (RT 3663.) The court ruled that he would not let the prosecutor "get into that." (RT 3664.) After further pressing by petitioner's counsel, the court ruled that any reference to petitioner's involvement in organized crime was to be deleted from the tape. (RT 3664.) The court stated, "I just don't think it is that prejudicial, but in--if it can be deleted, we will allow it then to be deleted. I don't see it as that prejudicial. But, if you feel as though it could lead to cross-examination, that I would allow Mr. Rossi not to get into, then we best keep it out." (RT 3664.)

The prosecutor protested that he should be allowed to cross-examine petitioner about his state of mind for leaving Sacramento, i.e. that there were Mafia hitmen after him. (RT 3665.) The court overruled this protest: "But that is not relevant. I mean, the probative value of his reasons for leaving Sacramento are--versus the prejudicial aspect of it would be highly prejudicial. The probative value of his reasons for going 80 miles east are not relevant." (RT 3665.)

The court and counsel then reviewed the portions of the tape to be deleted. (RT 3666-3671.) Petitioner's counsel objected to petitioner's statement that, "I won't cop to nothing I ain't done." (RT 3674.) Counsel objected that the statement referred to petitioner's prior criminal history. The court ordered this statement deleted. (RT 3676.) The entire passage reads as follows:

Dukes: Is there any other things that you've been

> charged with or that you've gone to jail for and haven't told me about?
> Petitioner: Huh-uh (indicating no). Nope. I was always caught for something, whether I, when I did do something, and I was guilty of it, I always pled guilty to it. When I did something, or when they said I did something I didn't, I won't cop to nothing I ain't done. (CT 2622.)

The court interpreted this statement as referring to petitioner's prior guilty pleas. (RT 3676.)

After the tape was excised, the court explained to the jury that it had ordered certain irrelevant statements deleted from the tape and that the jury was not to consider the deletions in its deliberations. (RT 3698.) The parties then stipulated that all deletions had been properly made by petitioner's investigator and the Nebraska interviewing police officer. (RT 3700.)

After the tape was played to the jury, the prosecutor informed the court that a section of the tape which should have been excised was not. (RT 3749-3750.) According to the prosecutor, a portion of the tape that had been ordered deleted was improperly played to the jury. Apparently, the following excised statements were played to the jury:

> Q: Why was it so hot in Sacramento that you had to leave?
> A: I was just in some trouble that I shouldn't get in trouble with.
> Q: Did you think they were going to kill?
> A: Most likely.
> Q: Drug dealing?
> A: It had to do with some underground people.
> Q: Have you ever killed anybody before?
> A: No. (CT 2627.)

The court stated that:

> I ruled that, why was it so hot in Sacramento that you had to leave, was admissible. Finding that it's always hot in Sacramento, but in any event, I considered it to be innocuous and admissible. The statements, did you think they were going to kill you. Most likely. Drug dealing. It had to do with some underground people, was to be deleted and it was not. I would find that those statements are not highly prejudicial. They are not probative, but not very prejudicial. (RT 3750.)

Petitioner's counsel moved for a mistrial. (RT 3751.) The court denied this motion. (RT 3751.) The court observed that the error was inadvertent on both sides. (RT 3751.) The court then indicated which portion of the tape was to be excised. (RT 3754.)

The next day the entire tape was played with the appropriate excisions. (RT 3760.) Before the tape was played, the jury admonished the jury as follows:

> Ladies and gentlemen, there is a slight glitch in the tape. Yesterday at the end of the tape, I don't know if any of you were able to hear what was said, whatever was said had been ordered by the Court to be stricken. And it didn't happen. And that's kind of why we called a quick halt to the whole process. The statements that were made at the end of the tape yesterday were not to have been disclosed to you for reasons that you need not even be concerned about. They were. You are not to even think about them. It's called, when the bells clang, you can't unclang it, but I must admonish you that in your deliberations, you are not to even talk about what did occur yesterday and--concerning the tape itself. There are certain things in the tape, as I indicated to you yesterday, that I have decided should not be disclosed to you for legal reasons. Part of that was. And we have now taken that out. It's a very short portion. It's not a material portion. And we are now going to play the tape with that out of--out of the record. And you are not to form any opinions about it being taken out of the record. (RT 3759-60.)

Later on cross-examination, the prosecutor asked petitioner:

> Q: Move on. Page 26. Do you remember in that statement to the authorities in Nebraska--I'm taking the last portion of that answer-- "I won't cop to nothing I ain't done"?
>
> A: I think I said something like that. (RT 4682.)

Out of the presence of the jury, petitioner's counsel moved for a mistrial based on admission of this statement. (RT 4683.) The court denied the motion, and stated, "I don't know that any damage has been done, because it could very much allude to the present circumstances under which Mr. Morris found himself, and I don't think it has any reference or any innuendo to any

other situation that he was embroiled in." (RT 4685.) The court told the jury to disregard the last question asked by the prosecutor and the statements made by the prosecutor regarding that question. (RT 4685.)

The trial court had ruled inadmissible both of the at-issue statements. In the instant petition, petitioner argues that the admission of these statements violated due process. As discussed above, a violation of fundamental fairness must occur in order for a due process violation to exist.[17/]

The court will examine the first statement. During the playing of the tape, the jury heard petitioner state that he was involved with some underground people with whom he should not get in trouble. Although the relevance of the evidence, i.e., why petitioner left Sacramento, is highly suspect, this court cannot find that this statement was so prejudicial as to violate fundamental fairness. It would be a stretch to find that this statement directly implicated petitioner in organized crime or other gang activity. At worst, the jury was informed that petitioner associated with bad persons, and hence may have been a bad person himself. Although not completely innocuous, this prejudice does not rise to Estelle v. McGuire standards. Petitioner's conviction did not significantly hinge on the admission of this evidence

Next, the court cannot find that the admission of petitioner's statement, "I won't cop to nothing I ain't done," violated fundamental fairness. Firstly, petitioner has miscast the issue as one involving the admission of evidence. The trial court had clearly excluded the evidence. Rather, the issue is one of prosecutorial misconduct– an issue that has not been exhausted. See Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887 (1995).

Even if considered exhausted, the court cannot find that the similar standard for judging whether a prosecutor's misconduct rises to the level of a due process violation has been satisfied ("so infected the trial with unfairness as to make the

---

17. Petitioner is, in effect, challenging the denials of his motions for mistrials regarding the admission of this evidence. The same standard applies in determining whether the admission of the evidence violated due process.

resulting conviction a denial of due process").[18/] To be sure there appears to be little explanation at this point for the prosecutor's fairly blatant disregard for the trial court's rulings; however, the reference was brief and out of context. Under these circumstances, petitioner's seeming confirmation of his Nebraska confession (although the statement was actually related to past crimes) would not have swayed the jury's ultimate determination concerning the validity of the Nebraska statements. Rather such confirmation was part and parcel of the confession itself, that is, petitioner never hinted to the Nebraska authorities that he was telling them anything but the truth and the additional "confirmation" of his statements– emphasis so to speak-- added little.

In addition, even if the statement repeated by the prosecution was more important than viewed by this court, the California Supreme Court found that this statement was properly admitted because it was relevant. Morris, 53 Cal.3d at 204, 279 Cal.Rptr. at 749. In particular, the Supreme Court stated, "Defendant's specific and emphatic assertion at the time of his confession that he would not admit to crime he did not commit was entitled to be weighed by the jury in assessing the credibility of his recantation." Id. This court agrees that the statement was relevant for that reason. Therefore, in the alternative, this court finds that due process was not violated because it should have been admitted in the first place.

Finally, the jury was instructed to disregard both statements. Juries are presumed to follow the court's instruction. Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987). There are some extreme situations in which curative instructions will not neutralize the prejudice when evidence is improperly admitted. See e.g., United States v. Bland, 908 F.2d 471, 473 (9th Cir. 1990)(court's comment that defendant on firearms charge was a child molester and killer cannot be cured by instruction). The challenged statements in the instant case are not so egregious that the curative instruction could not neutralize their impact.

Finally, petitioner alleges that his counsel was ineffective in failing to ensure that the challenged evidence was not admitted. As to the taped statement, petitioner's investigator

---

18. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974).

had listened to the tape and represented to counsel and the court that it had been properly excised. Petitioner's counsel properly relied on this representation when the tape was played. Under these circumstances, the court cannot find ineffectiveness. As to the second challenged statement, it had been ruled inadmissible based on counsel's objection. When the prosecutor questioned petitioner about the statement, counsel immediately objected. There was nothing more counsel could have done to prevent the prosecution from introducing this statement. Counsel was not ineffective.

For the reasons discussed above, the court recommends that this claim be dismissed.

3. Claim IX: Improper Admission of Letter from Petitioner to Barrett

Petitioner claims that the trial court improperly admitted into evidence a letter he wrote to Avette Barrett. Petitioner argues that the letter was not relevant and to the extent no objection was made to the introduction of this evidence, petitioner received ineffective assistance of counsel.[19/] At trial, Barrett read portions of two letters written to her by petitioner following their arrests and while they were in jail. Petitioner now objects to the reading of the following portion of the letter: "If they tell me no, then someone will get hurt, and I mean that, bad! *I've killed once for you, and if I have to I'll do it again!!! And you know that I can--you know that I can, and I don't need a rock to do it with either.*" (RT 4041.) (emphasis added.)

Clearly, petitioner's statement in the letter that he had killed before for Barrett and would do it again, and that he did not need a rock, were highly relevant. These statements were admissions by petitioner that he had killed Van Zandt. Because they were so relevant, the admission of these statements did not violate any notion of fairness, much less fundamental fairness. Additionally, the court cannot find that petitioner's counsel was ineffective in failing to exclude these statements. Any objection would have been overruled. Accordingly, the court

---

19. Petitioner also challenged admission of the letter on grounds that its admission violated the Best Evidence Rule and was more prejudicial than probative. These claims are procedurally barred. See May 27, 1997, Findings and Recommendations, pp. 24-25.

recommends that this claim be dismissed.[20/]

4. Claim X: Admission of Evidence Obtained Through Unreliable Scientific Methods

Petitioner alleges that the trial court improperly admitted evidence which was the result of electrophoresis testing to identify a dried blood stain sample. Petitioner clams that the trial court improperly relied on rulings made in an unrelated case in another county in determining admissibility. The trial court took judicial notice of the decision of Alameda County Superior Court Judge Byers in People v. Reilly, No. 6634, that electrophoresis testing was admissible. (CT 1129; Clerk's Supplemental Transcript at 2-7; RT 120-21, 213-14.) Petitioner argues herein not that electrophoresis is an unreliable scientific method, indeed no colorable facts have been presented, only a bare allegation, but rather that petitioner was denied his right to cross-examine witnesses when the trial court took judicial notice of a contested electrophoresis admissibility hearing in another trial court case.

On appeal, the California Supreme Court did not make a finding on the validity of electrophoresis on the basis of assumed facts from a trial transcript, but rather found this electrophoresis evidence reliable as a matter of law:

> Citing our decision in People v.Brown (1985) 40 Cal.3d 512, 530-533 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds in California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837], in which we found that the prosecution had failed to meet its burden of establishing the scientific acceptability of electrophoresis, defendant maintains that a similar failure occurred here. His argument is unpersuasive.
>
> Electrophoresis allows typing of individual blood proteins and enzymes found in a blood sample by a method that separates electrically charged molecules.

---

20. Equally unmeritorious is petitioner's claim that admission of the letter deprived petitioner of the right to confront witnesses. The relevance of the letter was *petitioner's* admissions; whether petitioner desired to "confront" himself was up to him.

A few months after defendant's trial, the Court of Appeal found that it had gained general acceptance in the scientific community. Reviewing a record containing extensive expert testimony on the subject, the Court of Appeal observed that the only dissenting voice on the issue of general acceptance, Dr. Benjamin Grunbaum, emphasized only remediable defects in the knowledge and ability of the analyst rather than in the technique itself. (People v. Reilly (1987) 196 Cal.App.3d 1127, 1137-1144 [242 Cal.Rptr. 496].) Reilly has been followed by two other panels of the Court of Appeal. (People v. Yorba (1989) 209 Cal.App.3d 1017, 1023 [257 Cal.Rptr. 641]; People v. Morris (1988) 199 Cal.App.3d 377, 383 [245 Cal.Rptr. 52].) We, too, have endorsed Reilly, although in dictum. (Coleman, supra, 46 Cal.3d at p. 779, fn. 23.) Electrophoresis has been found acceptable in at least 19 appellate decisions from 11 states. (Annot., Admissibility, in Criminal Cases, of Evidence of Electrophoresis of Dried Evidentiary Bloodstains (1989) 66 A.L.R.4th 588, 593-602, and cases cited; State v. Fenney (Minn. 1989) 448 N.W.2d 54.) Most of these cases were decided after Reilly.

Only Michigan has refused admission of electrophoresis testing, as shown by People v. Young (1986) 425 Mich. 270 [391 N.W.2d 270].[footnote omitted.] But, since Young, Dr. Grunbaum, who was also the chief defense expert witness there, has apparently abandoned his attack on the testing method to focus on the prospect of analyst error rather than inherent defects. He and other scientists now concede the reliability of the method if it is properly carried out. (See Reilly, supra, 196 Cal.App.3d. at pp. 1148-1150.) Moreover, the Young decision has been criticized in two jurisdictions and no jurisdiction, other than Michigan, appears to follow it. (E.g., State v. Fenney, supra, 448 N.W.2d at p. 60; State v. Surface (S.D. 1988) 440 N.W.2d 746, 750; Annot., supra, 66 A.L.R.4th at pp. 593-602.)

> Based on the virtually unanimous appellate authority upholding the admission of evidence from electrophoresis testing, we hold that such testing was sufficiently accepted in the scientific community at the time of defendant's trial. [footnote omitted.] Significantly, defendant does not allege any specific defect in the technique either in general or as applied in his case. The prosecution expert was specially trained in the use of the technique; his qualifications were accepted by defendant's trial counsel. He testified to his procedures in this case and his belief as to their reliability. Defendant does not establish a failure to use correct scientific procedure or any other act or omission that affected the reliability of the testing or analysis in this case. There was no violation of the Kelly/Frye rule.

Morris, 53 Cal.3d at 207-208; 279 Cal.Rptr. at 751-752.

In the absence of the state supreme court's embracing of electrophoresis as a matter of law, petitioner might have a point. In order for facts to be the proper subject of judicial notice, "[s]uch facts must either be '(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'. . . Because the effect of judicial notice is to deprive the party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under [rules of judicial notice.]" International Star Class Yacht Racing Assoc. v. Hilfiger, __F.3d__, 1998 WL 272634 *3 (2d Cir. 1998) (interpreting Fed.R.Ev. 201). Even under analogous state rules it is difficult to understand how one party could submit the transcript of another proceeding on a disputed factual issue, and have that issue resolved without opportunity by the other party to rebut or cross-examine the historical testimony. And it is difficult to understand how much weight the trial court in this case gave to the proceeding which it judicially noticed. See RT 120-121 (court did not think the testimony would be of much use) and *compare* RT 213-214 (judicial notice of the entire electrophoresis proceeding taken in order to save two weeks of

testimony and 800 pages of transcript).[21/]

Nevertheless, it is not necessary to resolve this issue because the decision of the state supreme court in *this* case mooted the confrontation issue. It is beyond doubt that scientific techniques can become so well established that judicial notice is routinely taken of their reliability for purposes of evidence admissibility. For example, no party must "prove" from scratch that established fingerprint processing techniques provide reliable data for identification purposes. Indeed, in a more recent case, the Eighth Circuit recently held that courts could take judicial notice of the reliability of FBI established DNA protocols used for identification purposes. United States v. Martinez, 3 F.3d 1191, 1197 (8th Cir. 1993). This court also can see no reason why the state supreme court in this case could not review the judicial landscape and make an evidentiary ruling that the electrophoresis technique was so widely accepted as to make its admissibility (if performed properly) accepted as a matter of law *at the time of defendant's trial.* Even if petitioner wished to take scientific issue with the statement of the state supreme court (and no specific contrary facts have been alleged herein concerning the reliability of electrophoresis testing)[22/], habeas corpus relief is unavailable for alleged error in the interpretation or application of state law. Middleton v. Cupp, 768 F.2d at 1085.

Claim X should be denied.

5. Claim XI: Testimony of Van Zandt's Mother Improperly Admitted

Petitioner challenges the trial court's failure to require a stipulation regarding the matters testified to by Rickey Van

---

21. Respondent interprets petitioner's issue as only raising a claim with respect to the reliability per se of electrophoresis. Not so, petitioner is challenging the alleged lack of opportunity to "confront" judicially noticed evidence.

22. In order for petitioner to demonstrate that the admission of the electrophoretic evidence violated due process, he must demonstrate that the alleged error involved "fundamental fairness." Estelle v. McGuire, supra. Petitioner has presented no evidence that the admission of this evidence involved fundamental fairness. For example, he has submitted no evidence indicating that electrophoretic testing is unreliable.

Zandt's mother, Lowelene Helms.[23/] The background of this claim is as follows.

For purposes of the guilt phase case , the prosecutor initially attempted to bring on the victim's mother to identify her son from autopsy photos. The trial court, recognizing that use of the mother for this purpose was highly prejudicial, rebuffed the prosecutor's attempt to do so. (RT 3151.) The defense thereafter, in order to keep the victim's mother off the stand, offered to stipulate that Van Zandt was in lawful possession of the van and credit cards entrusted to him by his mother. The defense was also willing to stipulate that no permission had been given by the mother for any third party's use of the van or credit cards. (RT 3151.) The prosecution refused the stipulation, and the trial court permitted examination of the victim's mother to bring out these rather mundane evidentiary details.

Respondent initially objects to petitioner's claim that it violated due process for the trial court not to accept the defense stipulation to evidentiary matters on grounds of procedural default. Obviously, petitioner had sought to compel use of the stipulation, and cannot be defaulted because the trial court refused to compel the prosecutor to accept it. However, on direct appeal, the state supreme court faulted petitioner's trial counsel because he had not made specific objections to questions about other photographs which showed the victim beside the van, and background testimony that the victim's father had just died from cancer, and that the victim was just tying to "get away" from a sad situation. People v. Morris, 53 Cal.3d at 208, 279 Cal.Rptr. at 752. Nevertheless, the state supreme court reached the merits and determined that the stipulation should have been accepted, but that the testimony as a whole was not unduly prejudicial. Id. at 208-209, 279 Cal.Rptr. at 753.

The court finds the procedural default of the state supreme court rather technical and arbitrary. The entire point of the stipulation was to permit proof of undisputed background details to the case, but to preclude the inevitable emotional impact of the mother at the guilt phase as well as the inevitable

---

23. Petitioner also separately claimed that the admission of the testimony violated due process. This claim is procedurally defaulted. See July 2, 1997, order .

uncontrolled, volunteered prejudicial testimony. The stipulation was also offered so that defense counsel would not appear to be unduly mean spirited by retaining the mother on the stand while he made a myriad of objections to matters which were not really the subject matter of dispute. Moreover, to require defense counsel to move to strike the improper, volunteered testimony would simply highlight the prejudice before the jury. In any event, however, this court finds that the state supreme court did not clearly delineate that it was making alternative rulings herein such that it can be found that the procedural ruling was in fact an alternative, independent ground.

Nevertheless, this court agrees with the state supreme court on the merits of the objection, and in any event, does not find a violation of fundamental fairness– the sine qua non of an evidentiary issue in habeas corpus. To be sure, the mostly irrelevant, prejudicial, volunteered testimony came before the jury. The jury was informed *in the guilt phase* about the last conversation that mother and son had, the fact of the family tragedy involving the father's death from cancer, that the victim was her only child and that "[y]esterday was his birthday. He would have been 30." Also, the fact that the van was returned "full of drugs" was also highlighted. She was asked to identify a photograph of her son while he was living. (RT 3155-3161.) The prosecutor knew precisely what he was doing, and the type of inappropriate evidence that would come before the jury.

The state supreme court was certainly correct that the stipulation should have been accepted. However, as noted by the California Supreme Court, the testimony of Ms. Helms was primarily directed to undisputed matters. Morris, 53 Cal.3d at 208, 279 Cal.Rptr. at 753. Also, thanks to defense counsel not interjecting himself, the testimony was relatively short. The court has reviewed the testimony in its entirety, and there does not appear to have been any emotional breakdowns. This court agrees with the California Supreme Court that the jury's passions or prejudices were not unduly excited by such references. Id.[24]

---

24. Respondent's citation of Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 2609 (1991) is inapposite. While it is appropriate to have victim impact testimony at the penalty phase, it is decidedly inappropriate

Accordingly, the court cannot find that the failure to require a stipulation under these circumstances violated due process. This claim should be denied.

6. Claim XII: Prosecution Questioning Defense Witness Re: Devil Worship

In this claim, petitioner alleges that when defense witness Erin Baker testified, the prosecutor cross-examined her concerning her alleged former belief in devil worship. Petitioner alleges that this violated Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093 (1992).[25/]

Erin Baker, an inmate, testified that she was serving a sentence for armed robbery. (RT 4366.) She testified that while she was incarcerated with Avette Barrett, Barrett received letters from petitioner. (RT 4367-4368.) In these letters, petitioner stated that he would "take care of it all." (RT 4368.) Barrett told Baker that petitioner was "going down for her." (RT 4368.) At trial, Barrett had testified that petitioner had committed the murder on his own initiative, and Baker was called by the defense to refute Barrett's testimony. On cross-examination, the prosecutor asked her the following regarding her devil worship:

Q: Are you a devil worshiper?
A: I used to be a devil worshiper.

....

Q: What--what are your or what were your beliefs as a devil worshiper?
A: At that time?
Q: Uh-huh (affirmative).
A: Just to do whatever I wanted to do.
Q: And you worship Lucifer; is that correct?

---

to hear victim impact testimony at a bifurcated guilt phase. The victim's family's tragedy usually has little to do with the guilt phase issues.

25. In this claim, petitioner also alleges that his constitutional rights were violated when the defense was required to disclose to local law enforcement authorities that they intended to call out of county jail inmates as witnesses on petitioner's behalf at trial. This claim is procedurally defaulted. See May 27, 1997, Findings and Recommendations.

The court also observes that neither party cited to the part of the record containing Baker's testimony.

A: Yes, I did. (RT 4372-4373.)

On redirect, petitioner's counsel followed up on this topic:

Q: When you describe yourself as an ex-devil worshiper, when did you stop being a devil worshiper?

A: When I was 18 years old.

Q: When you were 18 years of age. And how old are you now?

A: I'm 20.

Q: You haven't been a devil worshiper for two years?

A: No.

Q: Who do you worship now?

A: I don't worship nobody. (RT 4374.)

In Dawson v. Delaware, the Supreme Court held that a *defendant's* First Amendment rights may be violated if evidence of his membership in a gang shows only his abstract beliefs. Because the instant claim challenges evidence of a witness' former devil worship, Dawson is not implicated. The court observes that Fed. R. Evid. 610 provides that evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. However, Rule 610 has no constitutional underpinning as far as this court is aware, and cannot be used as a basis for a constitutional claim in a § 2254 proceeding. Moreover, although it is clear that the prosecutor violated state law as well, Cal. Evidence Code § 789, Cal. Const. Art. I, Sec. 4, violations of state law are not actionable herein. Even if a federal constitutionally based rule concerning not asking a witness questions about religious affiliation for impeachment purposes could be fashioned, such a rule would be "new" according to Teague v. Lane, and not applicable herein.

It is unclear whether petitioner has exhausted a claim that admission of this evidence violates due process (an Estelle v. McGuire claim), or whether petitioner has claimed prosecutorial misconduct. See statement of Claim XII. However, even if those doctrines were at issue here, petitioner would not ultimately benefit from their application. The questioning of Baker regarding her devil worshiping beliefs by the prosecutor was no doubt inflammatory and unprofessional. However, Baker was not the only inmate witness to testify regarding the credibility of Barrett. The undermining of her

credibility by this reference did not impact the credibility of the other inmate witnesses. In addition, Baker's testimony indicated that she was no longer a devil worshiper and that she was presently 20 years old. Under these circumstances, the reference to her past devil worshiping reflected more on her maturity than her credibility. That she was a convicted criminal would have had a stronger impact on the jury's weighing of her credibility. Finally, there were no specific practices of devil worship referenced which would have been abhorrent to the reasonable juror, e.g. cruel animal sacrifice, masochistic practices. Under these circumstances, the court cannot find that an error of fundamental fairness occurred. This claim should be denied.

D. Claims VI and VII: Claims Regarding Petitioner's Nebraska Arrest

1. Claim VI: Improper Admission of Petitioner's Statement to Law Enforcement Officers

Petitioner challenges three statements he gave to Nebraska law enforcement officials--his pre-arrest statement, his pre-arraignment statement and his post-arraignment statement.

Pre-arrest Statement

The California Supreme Court summarized the facts surrounding this claim as follows:

> Thomas Logan, a hitchhiker who was picked up by defendant and his two female companions in the van, left their company and placed a "911" call to Nebraska police about 10 p.m. on September 15, 1985. Logan reported that the van's occupants had killed the owner and that the van was full of marijuana. He described the van as a green Dodge camper with California license plates. Logan's report was relayed to state, county, and local police in the area where he was picked up. The green van traced to a motel parking lot in Lexington, Nebraska. Police converged on the spot and verified that defendant, whose name had been reported by Logan, had rented room 238 and had indicated that he was driving a

> green van with California license plate number 231 NVL.
>
> Two officers, a state trooper and a chief deputy sheriff, approached the van and, with the aid of the lighting in the motel parking lot and their flashlights, observed four or five pounds of marijuana as well as stains on the curtains. The van's California license plate was 321 NVL. The officers proceeded to room 238. The state trooper knocked and identified himself as a peace officer. Defendant opened the door. The state trooper asked defendant if he was Bruce Morris and defendant answered affirmatively. When the chief deputy asked if the officers could come in, defendant stood back and motioned for them to enter. The state trooper then asked defendant if he was driving the green Dodge van in the lot; defendant responded affirmatively. The state trooper then told defendant that he was under arrest for possession of marijuana.

People v. Morris, 53 Cal.3d at 196-197, 279 Cal.Rptr. at 744-745.

Petitioner argues that the failure to give him Miranda warnings when he was subjected to the custodial interrogation at the motel rendered his statements inadmissible.

A person is entitled to be advised of the rights provided under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), only when the person is subjected to "custodial interrogation."[26] Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444, 86 S.Ct. at 1612. The mere fact that questioning takes place in a "coercive environment" does

---

26. The ultimate finding of "custody" is to be determined as a mixed question for de novo review. Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995). Similarly, the ultimate determination about whether a defendant was under "interrogation" is a de novo determination for this court; however, "what was said" in the context of determining whether an interrogation took place is a historical fact which, if found by the state courts, is presumed correct. See Robinson v. Borg, 918 F.2d 1387, 1390 (9th Cir. 1990).

not automatically trigger the requirement that a Miranda warning be given. California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983); Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 (1977). Moreover, the fact that an individual is the "focus" of a criminal investigation is not sufficient, in and of itself, to invoke Miranda's protections. See Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612 (1976). In each case, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Beheler, 463 U.S. at 1125, 103 S.Ct. at 3520 (quoting Mathiason, 429 U.S. at 495, 97 S.Ct. at 714.) Finally, custodial questioning constitutes interrogation only if the questions are reasonably likely to elicit an incriminating response. United States v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1981).

During the pre-arrest conversation, Nebraska state troopers asked petitioner two questions: his name and whether he was driving the van in the parking lot. Petitioner was asked his name by officers standing outside his hotel room door. Clearly, petitioner was not in custody at the time. Petitioner then voluntarily permitted the troopers into his hotel room where they asked him if the van outside was his. The court cannot find that petitioner was in custody at that time either. Furthermore, asking petitioner his name and whether the van outside was his did not constitute the type of interrogation requiring a Miranda warning. These questions were designed to ensure that the proper person was arrested. Clearly, law enforcement is not required to give a Miranda warning every time they ask persons identifying information in order to ensure that they are arresting or questioning the proper person. These types of questions are generally not designed to elicit incriminating responses.

Because petitioner was not subject to a custodial interrogation at the time he gave his prearrest statement, he was not entitled to a Miranda warning. Accordingly, this claim should be denied.

Pre-arraignment Statement

The California Supreme Court summarized the facts regarding this claim as follows:

> Defendant and his two female companions were arrested shortly after midnight. Defendant invoked

his right to remain silent in response to a Miranda warning given at the county jail at 1:45 a.m. on September 16, 1985. He was not interrogated at that time and was placed in a jail cell.

Defendant's companions waived their Miranda rights and gave statements at 1:45 and 2:44 a.m. The record is not clear as to when the two women were arraigned, but it appears that it was around the noon hour on the 16th. Defendant was arraigned at 4:34 p.m. that day. Each of them was arraigned solely on the Nebraska marijuana charges.

Shortly after noon on September 16, defendant asked to speak with an officer. A sheriff's investigator met with defendant in the jailhouse library and asked him what he needed. Defendant replied that he wanted to talk about his California crimes, but wanted some concessions. He requested, among other things, that his companions not be prosecuted and that he be allowed to speak with his girlfriend, Avette Barrett. The investigator responded that he had no power to grant any concession and that he would have to speak with the county attorney. He then contacted the county attorney, who arrived at the jail library 15 to 20 minutes later. The investigator and the county attorney were also joined by a state trooper and the chief deputy sheriff, the officers who had arrested defendant.

The chief deputy sheriff turned on a tape recorder at 2:39 p.m., immediately after his arrival. The state trooper gave defendant a Miranda warning and defendant signed a waiver form. At this point, the chief deputy arranged for Barrett to be brought into the library and allowed defendant to speak with her for about five minutes. Defendant told Barrett that he would not allow her to suffer for something she did not do. About 2:45 p.m., the group moved across the street to the courthouse because that building had a better recording system and was less noisy. The interview recommenced at 2:52 p.m. and continued for approximately an hour. During the interview, the

> investigator told defendant that the investigator could make no concessions and had no jurisdiction over California charging decisions. He also stated that although defendant had requested and been permitted to speak with Barrett, that permission was not an inducement offered by the officers to obtain a statement. Defendant expressed agreement with the investigator's statement.
>
> During the interview, defendant confessed to the robbery and murder of Rickey Van Zandt. He admitted his plan to steal Van Zandt's van. He admitted hitting Van Zandt over the head numerous times with a rock the size of a softball and with a stick. He stated the women were not present when he hit Van Zandt. He admitted telling Logan, the hitchhiker he had picked up, that he had "knocked out" Van Zandt. He professed that he did not intend to kill Van Zandt, but only to render him unconscious.

People v. Morris, 53 Cal.3d at 199-200, 279 Cal.Rptr. at 746.

Petitioner argues that his arraignment was purposefully delayed so that a statement could be obtained from him. He argues that the delay in his arraignment, the conditions surrounding his arrest and confinement in Nebraska, his own mental disabilities, his confabulated belief that Avette Barrett was pregnant, among other things, caused him to summon law enforcement officials and make an inaccurate confession. He argues that these circumstances combined to overcome his will and caused him to make a statement that he would not otherwise have made. Petitioner makes an "involuntary" confession claim. To the extent that petitioner makes an allegation that his confession or Miranda waiver was unknowing or unintelligent, i.e. that petitioner did not know what he was saying when he made the confession (whether pressured to make a false confession or not), that allegation is discussed below. See Colorado v. Spring, 479 U.S. 564, 573, 107 S.Ct. 851, 857 (1987).

Involuntary confessions in state criminal cases are inadmissible under the Fourteenth Amendment. Blackburn v. Alabama, 361 U.S. 199, 207, 80 S.Ct. 274, 280 (1970). The voluntariness of a confession is evaluated by reviewing both the police conduct in extracting the statement and the effect of that

conduct on the suspect. Miller v. Fenton, 474 U.S. 104, 116, 106 S.Ct. 445, 453 (1985). Absent police misconduct causally related to the confession, there is no basis for concluding that a confession was involuntary in violation of the fourteenth amendment. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 521 (1986). Colorado v. Connelly involved a defendant who claimed that voices that he heard had "commanded" him to make a confession to police. Defendant's state of mind was not pertinent to the threshold question of whether coercive police conduct existed in the first instance.

Petitioner alleges, in part, that his prearraignment confession was involuntary, or that his Miranda waiver was involuntary, because of his mental disabilities, his false belief that Barrett was pregnant and the circumstances surrounding his arrest. There is no connection between these factors and police conduct. Petitioner does not allege, for example, that the police were aware of his mental disabilities and exploited them. In any event, there is no evidence or colorable allegation before the court to support such a claim. Petitioner also alleges that he was improperly induced to confess by being permitted to speak with Barrett. However, petitioner himself requested that he be permitted to speak with Barrett. Furthermore, after making this request, the investigator told petitioner that he had no power to grant any concession and that he would have to speak to the county attorney. There is no evidence that county or law enforcement used petitioner's request to speak with Barrett in order to induce him to confess. Rather, petitioner suffered from "internal pressures" unrelated to any police misconduct. Therefore, these circumstances did not render petitioner's confession involuntary.

Petitioner next alleges that the delay in his arraignment caused his prearraignment confession to be involuntary. Defendant was arrested shortly after midnight, and arraigned at 4:34 p.m. later that day. The admissibility of a confession is determined under the totality of the circumstances. Arizona v. Fulminate, 499 U.S. 279, 286 (1991). A delay in arraignment is only an element to be considered in determining voluntariness. Gallegos v. Nebraska, 342 U.S. 55 (1951).

As noted by the California Supreme Court, petitioner's arraignment was within the two-day period of his arrest allowed by California Penal Code § 825. Morris, 53 Cal.3d at 200, 279 Cal.Rptr. at 747. There is no evidence indicating that this delay was intentional, i.e. an attempt to coerce a confession from

petitioner. Furthermore, the time between the arrest and the arraignment is not so long that this court would find the delay inherently coercive. There is just no evidence indicating that petitioner's confession was "coerced" by any delay between his arrest and the arraignment. This claim should be denied.

Post-arraignment Statement

The California Supreme Court summarized the facts regarding this claim as follows:

> Defendant was arraigned on the marijuana charges on the afternoon of September 16. He requested counsel at the arraignment and the matter was continued for two days. Between 7:30 and 8 p.m. that day, the sheriff's investigator learned that California authorities had not been able to locate the victim's body from the information supplied by defendant in the pre-arraignment statement. The investigator went alone to the jail and met with defendant in the library. He reminded defendant generally of his Miranda rights. Defendant helped him draw a map with specific landmarks of the area where defendant had left the victim's body. The map and defendant's post-arraignment statement were admitted at trial over his objection.

People v. Morris, 53 Cal.3d at 201, 279 Cal.Rptr. at 747-748.

Petitioner challenges his post-arraignment statement on grounds that he was not given warnings and also that he made the statement in the absence of counsel, which he had requested. At the time petitioner made his post-arraignment statement regarding the location of the body, he had not been charged with the murder. Rather, he had been arraigned only on the marijuana charge for which he had requested appointment of counsel. The Sixth Amendment right to counsel is offense-specific. McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 2207 (1991). Therefore, Nebraska officials did not violate petitioner's Sixth Amendment right to counsel by questioning him about his involvement in a crime for which he had not yet been indicted and as to which adversarial proceedings had not commenced. See id. at 175-76, 111 S.Ct. at 2207-08 (quoting Maine v. Moulton, 474 U.S. 159, 179-80, 106 S.Ct. 477, 488-89 (1985)). See also Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Petitioner also claims that his post-arraignment statement was invalid because he was not readvised of his Miranda rights. Approximately five hours earlier that day, petitioner had been advised of his Miranda rights prior to giving his prearraignment statement. Petitioner is arguing, in essence, that his first Miranda waiver indicating his willingness to discuss the murder was not continuing.

Courts have consistently upheld the integrity of Miranda warnings in cases where several hours elapsed between the reading of the warning and the interrogation. United States v. Diaz, 814 F.2d 454, 461 (7th Cir. 1987)("several" hours between warning and cooperation is acceptable); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984)(three hours between warning and cooperation is acceptable); United States v. ex. rel. Henne v.Fike, 563 F.2d 809, 814 (7th Cir. 1977) (nine hours between warning and cooperation is acceptable); United States v. Osterburg, 423 F.2d 704 (9th Cir. 1970)(one hour and fifteen minutes between warning and cooperation is acceptable).

In the instant case there was a short lapse of time between the original warning and the postarraignment interrogation. That the postarraignment interrogation followed the prearraignment interrogation where the waiver was actually given is not significant. This court is aware of no case requiring a Miranda readvisement under these circumstances. There is nothing in the record to indicate that petitioner did not understand that he could assert his Miranda rights at the postarraignment interrogation. He understand the nature of Miranda rights, as he had previously waived them, and the officer reminded him of them prior to the postarraignment questioning. Furthermore, the postarraignment questioning involved an attempt to clarify information that petitioner had given at the prearraignment interrogation. Under these circumstances, the court cannot find that petitioner's postarraignment statement was rendered inadmissible by the failure to readvise him of his Miranda rights.

Finally, petitioner generically argues that all three statements discussed above were "confabulated and unreliable" and were the product of his organic brain damage and underlying mental impairments. The court assumes this conclusion to be an allegation that the Miranda waiver(s) and the confession itself was unknowing and unintelligent. As observed above, the issue of a knowing and intelligent waiver of constitutional rights is a different issue from the

voluntariness of such a waiver. See also United States v. Bautista-Avila, 6 F.3d 1360, 1365 (9th Cir. 1993). A waiver of constitutional rights, and the giving of a confession subsequent to the waiver must have been made with an awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. Id.; Derrick v Peterson, 924 F.2d 813, 820 (9th Cir. 1990). This circuit has found a waiver to be knowing and intelligent when, in response to questions by the police, a defendant has said that he understands his rights and that he is willing to talk. E.g., United States v. George, 987 F.2d 1428, 1431 (9th Cir. 1993); United States v. Gordon, 974 F.2d 1110, 1116 (9th Cir. 1992). A defendant need not have perfect comprehension. If he understands his rights in their essential sense, it is not fatal that the has not thought through all of the consequences of speaking to the police. Derrick, 924 F.2d at 824.

The sum total "factual" presentation put before this court to oppose summary judgment is as follows: " Petitioner's statements were confabulated and unreliable and were the product of his organic brain damage and underlying mental impairments." Amended Petition at 27. See also similar allegation at p. 80-81 Other than these conclusory assertion, petitioner has offered no *evidence* whatsoever to support this claim. This is the quintessential allegation, discussed by Johnson v. Scott, supra, which is insufficient to warrant an evidentiary hearing or discovery in habeas corpus–"'[B]old assertions on a critical issue in a habeas petition, unsupported and unsupportable by anything else contained in the record.'" There is simply no evidence that any brain damage that petitioner may or may not have had suffice to render him unable to meet the rather de minimis standards for being able to make a knowing and intelligent decision. Petitioner has not even approached the threshold of alleging colorable facts which would warrant further investigation. There are no facts of record contemporaneous with the Miranda waivers and confession that would even hint at mental problems significant enough to render petitioner uncomprehending of what he was doing. Petitioner's claim herein is truly stated only as a means to search for its existence. In addition, the court details the medical evidence produced at trial in discussion of Claim XXXVII - - none of which could be interpreted to demonstrate that petitioner suffered from any mental defect sufficient to preclude a knowing and intelligent decision. The court finds

that petitioner has not met his burden with respect to this allegation, Celotex, supra, and recommends that this claim be denied.

2. Claim VII: Warrantless Arrest

In this claim petitioner alleges that his constitutional rights were violated by the failure of the Nebraska authorities to obtain an arrest warrant prior to arresting him at the motel location.[27] Petitioner argues that no exigent circumstances existed to justify the warrantless arrest. Hence, all fruits of that arrest including the Nebraska confession and search after arrest are suppressible.

Although petitioner argues that several constitutional amendments were violated in connection with the warrantless arrest (indeed, nearly every claim in the amended petition asserts a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments), only the Fourth Amendment is truly implicated here. However, petitioner is not entitled to federal habeas corpus review for his Fourth Amendment claim if he received a full and fair *opportunity* to litigate this claim in state court. Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052 (1976); Villafuerte v. Lewis, 111 F.3d 616, 627 (9th Cir. 1997) (applying Stone to a warrantless arrest case); Terrovona v. Kincheloe, 912 F.2d 1176, 1178 (9th Cir. 1990) (same).

In the instant case, petitioner had a full and fair *opportunity* in state court to litigate his Fourth Amendment claim challenging his warrantless arrest. Petitioner brought before the state court and litigated several issues arising out of petitioner's Nebraska arrest, including pre-arrest statements, and subsequent proceedings in that state. The fact that petitioner did not attack his arrest per se before the state trial court does not mean that he did not have the opportunity to do so. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996). Stone is fully applicable herein.

Claim VII should be denied.

---

27. The court ordered stricken as unexhausted petitioner's claim that counsel was ineffective for failing to object to his arrest on this ground. See May 27, 1997 Findings and recommendations and July 2, 1997 Order.

E. Claim XIII: Petitioner's Absence From Trial

Petitioner argues that his absence from an unreported, informal conference between the court and counsel concerning jury instructions violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights. The day after the informal conference, the court held a formal conference on the record dealing with the same subject at which petitioner was present. Petitioner alleges (in this claim) that he was actively involved in assisting his attorneys at trial. For that reason, he was prejudiced by his absence during the discussions concerning these instructions.[28]

Neither party has cited the court to the portion of the record where these matters occurred. The court has, instead, referred to respondent's opposition brief filed in the California Supreme Court February 14, 1990, page 115. The informal conference was held on June 15, 1987. On the next day, June 16, 1987, the court held a formal conference on the instructions on the record with petitioner present. (CT 2200.) Petitioner's counsel objected to petitioner's absence from the previous day's conference. (RT 4721.)

"The Constitution only grants to the criminal defendant the 'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings...'" United States v. Brown, 571 F.2d 980, 986 (6th Cir. 1978)(quoting Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525 n. 15 (1975)). See also, United States v. Gagnon, 470 U.S. 522, 526-527, 105 S.Ct. 1482, 1484 (1985). Fed. R. Crim P. 43(c)(3) codifies the fact that a defendant need not be present at a "conference or argument upon a question of law." In United States v. Sherman, 821 F.2d 1337, 1338 (9th Cir. 1987), the Ninth Circuit held that the absence of a defendant from an in-chambers discussion on jury instructions did not violate Rule 43. See also United States v. Rubin, 37 F.3d 49, 54 (2d Cir. 1994)(defendant not entitled to be at a jury instruction formulation conference). If the federal courts do not require the defendant's presence at such hearings, it would be perverse to hold that the state courts must nevertheless have the defendant present at such hearings.

---

28. At other places in the Amended Petition, petitioner claims that he was unable to assist his counsel by reason of mental defects. Claim XXXVIII–"Petitioner's Incompetence to Assist Counsel."

In any event, petitioner has the burden of demonstrating in this context that his absence had a substantial and injurious effect on the jury's verdict. Hegler v. Borg, 50 F.3d 1472, 1477, 1478 (9th Cir. 1995). In the instant case, petitioner has not demonstrated that his absence from this hearing had a substantial and injurious effect on the jury's verdict. Although petitioner may have assisted his counsel, it is unclear how he would have assisted him at a hearing regarding jury instructions. This is especially true since the court held a formal conference on the record regarding the same matters the next day. Petitioner's claim that he could have assisted his counsel on the day before in a fashion different from the next day is unsupported and conclusory.

For the reasons discussed above, the court recommends that respondent be granted summary judgment as to this claim.

III. GUILT PHASE INSTRUCTIONS: CLAIMS XIV, XVI, XIX, XX, XXI, XXII, XXIII

Legal Standard

A challenge to jury instructions does not generally state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), citing Engle v. Isaac, 456 U.S. 107, 119 (1982); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th cir. 1983). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). The standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treatises of the United States (citations omitted)." Estelle v. McGuire, 502 U.S. at 67, 112 S.Ct. at 480. In order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness." 502 U.S. at 73; 112 S.Ct. at 482. The Supreme Court has defined the category of infractions that violate fundamental fairness very narrowly. Id.

Where what is at issue is the failure to give an instruction, petitioner's burden is "especially heavy" because it has been held that "[a]n omission or an incomplete instruction is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S.145, 155, 97 S.Ct. 1730, 1736

(1977). Moreover, a trial judge need not instruct the jury on a defense which would be inconsistent with petitioner's theory of the case, Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984).

The burden on petitioner is greater yet in a situation where he claims that the trial court did not give an instruction sua sponte. To the extent that petitioner rests his claim on a duty to give an instruction sua sponte under rules of state law, petitioner has generally stated no federal claim. Indeed, in the failure to give a lesser included offense instruction context, the Ninth Circuit has flatly held that the failure to give the instruction states no federal claim whatsoever. James v. Reece, 546 F.2d 325, 327 (9th Cir. 1976). However, the rules in this area are somewhat different in a capital case.

> In noncapital case, we have stated that the "[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976)(per curiam). Due process, however, requires that a lesser included offense instruction to a capital offense be given when the evidence warrants such an instruction. See Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982); Beck v. Alabama, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 2389-90, 65 L.Ed.2d 392 (1980)(Beck).

Woratzeck v. Ricketts, 820 F.2d 1450, 1457 (9th Cir. 1987), vacated on other grounds 486 U.S.1051, 108 S.Ct. 2815 (1988).

Nevertheless, in order to violate due process, the impact on the proceeding from failure to give an instruction sua sponte must be of a very substantial magnitude.

A. Claim XIV: Accomplice Instructions

Petitioner argues that the trial judge gave defective instructions related to accomplice liability which precluded the jury from considering petitioner's main guilt defense: that Barrett and/or Eckstrom were the actual perpetrators of the murder. Petitioner argues that over defense objection, the trial judge gave the following instruction:

> An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial. To be an accomplice, the person

> must have aided, promoted, encouraged, or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person that committed the offense and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense. (RT 4890-91.)
>
> If the crimes of robbery and murder were committed by anyone, the witness' Avette Barrett and Allison Eckstrom, were accomplices as a matter of law, and their testimony is subject to the rule requiring corroboration. (RT 4892.)

Petitioner argues that the trial judge refused to give Defendant's Special Instruction No. 1 which embodied the central defense theory that Barrett and Eckstrom were the actual perpetrators of the homicide. It stated:

> An accomplice is a person involved in the commission of the offense charged against the defendant whether by directly committing the act constituting the offense or aiding and abetting its commission. A person can be an accomplice even though the acts were committed at a different time and place than the acts charged against the defendant. (CT 2235.)

Petitioner argues that the jury was instructed that the trial judge had found, as a matter of law, that Barrett and Eckstrom were aiders and abettors to someone else's actual commission of the crime, and that the jury should reject petitioner's defense that they were the actual perpetrators.

In examining the previously given instructions regarding aider and abettor liability in their entirety, the court finds the challenged accomplice instruction not to be misleading and certainly not violative of due process. The trial court began by describing what constitutes an aider and abettor. (RT 4889-90.) The court further instructed that,

> Mere knowledge of the unlawful purpose of the perpetrator of an offense, coupled with the commission of an act which in facts aids the perpetrator, is insufficient to make *the defendant* an aider and abettor unless he intends to aid the perpetrator in the commission of an unlawful act.
>
> Any assistance offered by the *defendant* to the

perpetrator of the crime after the crime has been committed is insufficient to establish that he aided and abetted the perpetrator in the commission of the offense. (RT 4890.)

The trial court then went on to instruct the jury regarding accomplice testimony. It is within these instructions that the instruction challenged by petitioner above was read. The court will set forth these instructions in their entirety to put this instruction in context:

> An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial.
>
> To be an accomplice, the person must have aided, promoted, encouraged or instigated by act or advice the commission of such offense with knowledge or the unlawful purpose of the person that committed the offense and with the intent or purpose of committing, encouraging or facilitating the commission of the offense.
>
> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.
>
> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed by itself, and without any aid, interpretation or direction from the testimony of the accomplice tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged or that it corroborate every fact to which the accomplice testified.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining

evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect the defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe then the testimony of the accomplice is corroborated.

The required corroboration of the testimony of accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.

Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator is not criminal. And a person so assenting to or aiding or assisting in the commission of a crime without such knowledge is not an accomplice in the commission of such crime.

If the crimes of robbery and murder were committed by anyone, the witness', Avette Barrett and Allison Eckstrom, were accomplices as a matter of law, and their testimony is subject to the rule requiring corroboration.

The testimony of an accomplice ought to be viewed with distrust and received with care, caution and suspicion for the reason that its very source is tainted.

You must not accept the words of an accomplice at face value or with any presumption of truthfulness or judge them by the same standards as that applied to other witnesses.

An accomplice may have many self-serving motives that may influence his credibility such as the hope or expectation of leniency in return for testimony which

would help to convict another.

> This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it entitled after examining it with these cautions in mind and in light of all the evidence in the case.
>
> The testimony of an accomplice which tends to incriminate the defendant ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should also give it the weight to which you find it entitled after examining it with care and caution, and in light of the other evidence in the case.
>
> The testimony of an accomplice which does not tend to incriminate the defendant should be judge by the same standards as the testimony of any other witness. (RT 4890-4893.)

The challenged instruction was part of the general instructions regarding the credibility of accomplice testimony. In this context, the jury would have understood that this instruction applied to an assessment of the credibility of Eckstrom and Barrett. The instructions immediately before the accomplice/credibility instructions discussed petitioner's liability *if the jury found that Barrett and Eckstrom were the perpetrators*.

"A single instruction is not viewed in isolation, but in the context of the overall charge." United States v. Harrison, 34 F.3d 886, 889 (9th Cir. 1994). After considering the other instructions set forth above, this court cannot find that the challenged instruction misled the jury to believe that the judge had found that Barrett and Eckstrom could not be the actual perpetrators. By challenging the instruction in isolation, petitioner has taken it out of context. Because the court finds no due process violation, this claim should be denied.

B. Claim XVI: Instructions Failed to Distinguish Between Degrees of Murder

In this claim, petitioner makes several challenges to the murder instructions.[29/] Petitioner argues that the second degree implied malice murder instruction improperly failed to state the subjective requirement that petitioner consciously appreciate and disregard that his act created a danger to human life.

In analyzing this claim, the California Supreme Court stated,

> The omission of these instructions was not error. The evidence in this case established either that Van Zant was killed by defendant as a part of a robbery (the prosecution theory) or by Barrett and/or Eckstrom, with or without justification (the defense theory). Defendant advances no theory consistent with the evidence that would have allowed the jury to convict him of second degree murder. [footnote 12.] Hence, his objections concerning instructions about that offense are unfounded. [citations omitted.]

Morris, 53 Cal.3d at 211, 279 Cal.Rptr. at 754-755.

In footnote 12, the court stated,

> Defendant's hypothesis--that the jury might have concluded he was provoked into killing Van Zandt when Barrett told him Van Zandt had tried to rape her--is without evidentiary support. The jury would have had to reject the testimony and pretrial admissions of all the witnesses, including defendant himself, to reach this conclusion.

Morris, 53 Cal.3d at 211 fn.12, 279 Cal.Rptr. at 755 fn. 12.

This court agrees with the reasoning of the California Supreme Court. There was no evidence to support a second degree murder conviction. The prosecution tried petitioner on a felony-murder theory. Petitioner's defense was that Barrett and Eckstrom killed Van Zandt after he tried to rape Barrett. Because second degree implied malice murder was not

---

29. In paragraph G of this claim, petitioner argued that some of the instructions misdefined the mental state requirements which were necessary predicates for first or second degree murder. This claim is not exhausted, and was ordered stricken. See July 2, 1997, order.

implicated by any of the facts, the failure to give this instruction did not violate due process.

Petitioner next argues that the trial judge gave defective instructions which did not rationally distinguish between degrees of murder. Petitioner argues that his "guilt phase defenses were that he was factually innocent of murder or capital murder; that even assuming some involvement in a less serious offense, evidence suggested that petitioner experienced a mitigated mental state which reduced any culpability from first degree murder to a lesser degree of homicide." (Amended Petition, p. 39.)

The trial judge gave the following instructions concerning murder:

> The defendant is charged in Count I of the information with the commission of the crime of murder, a violation of section 187 of the Penal Code.
>
> The crime of murder is the unlawful killing of a human being with malice aforethought or the unlawful killing of a human being which occurs during the commission or attempt to commit a felony inherently dangerous to human life.
>
> In order to prove the commission of the crime of murder, each of the following elements must be proved:
>
> 1) That a human being was killed;
> 2) That the killing was unlawful; and
> 3) That the killing occurred during the commission of a felony, to wit: Robbery. (RT 4894-95.)

Petitioner argues that this instruction provides two standards for determining whether there has been a first degree murder: where there is an unlawful killing with malice aforethought or where there is a killing during the commission of a felony. Petitioner argues that in the next paragraph, malice aforethought is not mentioned but murder in the commission of a robbery is. Petitioner argues that these instructions improperly deleted an essential element of murder from jury consideration.

Again, "[t]he evidence in this case established either that Van Zandt was killed by [petitioner] as a part of a robbery (the prosecution theory) or by Barrett and/or Eckstrom, with or

without justification (the defense theory)." Morris, 53 Cal.3d at 211, 279 Cal.Rptr. at 754. This court agrees with the California Supreme Court that petitioner advanced no theory consistent with the evidence that would have allowed the jury to convict him of anything but first degree felony murder. Petitioner's defense was that he did not kill Van Zandt. As discussed above, a trial judge need not instruct the jury on a defense which would be inconsistent with petitioner's theory of the case. Bashor v. Risley, 730 F.2d at 1240. Therefore, the failure to specifically list malice aforethought as one of the elements of murder did not violate fundamental fairness. Because there was no due process violation, this claim should be dismissed.

Petitioner further argues that the judge failed to instruct that the jury was required to determine if the murder was first or second degree, pursuant to CALJIC 8.70, and that if there was reasonable doubt as to degree, the jury was to find the murder to be second degree. CALJIC 8.70 provides,

> Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine and state in your verdict whether you find the murder to be of the first or second degree.

Petitioner also argues (in the reply to respondent's motion) that the trial court should have read CALJIC 8.71, which provides that if there is a reasonable doubt as to degree of murder, the murder is of the second degree. Petitioner argues that this error was compounded by the trial court's reading of CALJIC 8.72 which provides that as between murder and manslaughter, a reasonable doubt is to be resolved in favor of manslaughter. (RT 4900.)

> The judge instructed on second degree murder as follows: Murder of the second degree is the unlawful killing of a human being as the direct causal result of an intentional act involving a high degree of probability that it will result in death, which act is done for a base, anti-social purpose, and with wanton disregard for human life.
>
> When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being. (RT 4896.)

For the same reasons the court above found that the failure to specifically identify malice as an element of murder did not violate due process, the court rejects petitioner's claim regarding the failure to read CALJIC Nos. 8.70 and 8.71. Petitioner advanced no second degree murder theory. Under these circumstances, the court was not obligated to read these instructions concerning second degree murder. Accordingly, this claim should be denied.

Petitioner argues that instructions related to heat of passion were wrongly refused. See Amended Petition at 41. He argues that the judge gave a number of instructions related to manslaughter and heat of passion. (RT 4896-4899.) However, the judge refused the defense request to instruct pursuant to CALJIC 8.73. (CT 2066, 2266.) Petitioner argues that CALJIC 8.73 permitted the jury to find second degree murder where there was provocation but the provocation was insufficient to reduce the crime to manslaughter. However, petitioner advanced no theory at trial that the killing was motivated by heat of passion. Under these circumstances, the court was not obligated under any principle of habeas corpus to instruct on this irrelevant theory. Bashor, supra.[30]

For the reasons discussed above, the court recommends that this claim be denied.

C. Claim XIX: Failure to Instruct that Felony-Murder Rule Does Not Apply to Assault with a Deadly Weapon

The trial court rejected petitioner's request for an instruction that the felony murder rule does not apply to assault with a deadly weapon. (CT 2255.) Petitioner is apparently arguing that the jury might have concluded that he was guilty of first degree felony murder based on his assault on Van Zandt,

---

30. Petitioner argues that state law requires the giving of an instruction that is supported by the evidence even when the theory is not advanced by the defense. Without commenting on petitioner's assertions of state law, petitioner's created speculation about a possible provocation experienced by petitioner (anger at finding out that one of his accomplices had allegedly been raped by Van Zandt) is not based on the evidence of record. Moreover, state law requirements about the giving of instructions does not guide federal habeas corpus.

while rejecting the prosecution's theory that he intended to commit robbery.

In rejecting this claim, the California Supreme Court stated,

> In light of the court's actual charge, defendant's suggestion cannot be supported. Robbery was the only felony mentioned by the court in the felony-murder instructions. The jury was told that in order to find defendant guilty of murder it would have to find as an essential element of the crime that "the killing occurred during the commission of a felony, to wit: Robbery." There were no instructions allowing considering of assault as a felony to which the felony-murder rule would apply. Assault was not mentioned at all by the court. Indeed, it was mentioned only by defense counsel in his argument to emphasize, consistent with the instructions, that a mere assault on the victim was not enough to convict defendant of first degree murder. Under these circumstances, defendant's suggestion that the jury found him guilty of felony murder because of an assault on Van Zandt amounts to speculation.
>
> Even assuming the court erred in refusing the requested instruction on assault, the error could not have prejudiced defendant. The jury's findings that defendant was guilty of felony murder and robbery, and that the robbery special circumstance was true, necessarily encompassed a determination that defendant formed an intent to steal before he struck Van Zandt and that he carried out the fatal beating to effectuate that intent. [footnote 13.] Defendant's claim of prejudice is inconsistent with the jury's determination and is, for that reason, rejected.

Morris, 53 Cal.3d at 212, 279 Cal.Rptr. at 755.

In footnote 13, referred to above, the California Supreme Court stated,

> The instructions emphasized that the defendant could not be convicted of felony murder unless the jury concluded that he formed an intent to steal before he killed Van Zandt and then carried out his murder to further that intent. For example, the jury was told: "The prosecution must also prove beyond a

> reasonable doubt that the intent to commit the crime of robbery arose before or during the commission of the acts which result[ed] in the death of the victim. If you have a reasonable doubt that defendant formed the intent to commit robbery only after engaging in the fatal acts, you may not convict of first degree murder on the felony murder rule." In addition, the jury was directed that it could find true the robbery special circumstance only if defendant had committed murder in order to carry out or advance the commission of a robbery or to facilitate escape or detection, and was further admonished that the robbery could not be "merely incidental" to the murder. By returning its verdicts of felony murder, robbery and the robbery special circumstance, the jury necessarily determined that defendant intended to steal and killed in order to do so.

Morris, 53 Cal.3d at 212 fn. 13, 279 Cal.Rptr. at 755 fn. 13.

This court agrees with the reasoning of the California Supreme Court regarding this issue. In accordance with this reasoning, this court finds that no due process violation occurred based on the trial court's failure to instruct that the felony murder rule does not apply to assault with a deadly weapon. This claim should be denied.

D. Claim XX: Irrelevant Instructions at Guilt Phase

Petitioner argues that the trial judge gave irrelevant instructions on involuntary manslaughter and excusable and justifiable homicides. Petitioner argues that because these instructions were unrelated to other issues at trial they misled and confused the jury. Petitioner does not cite to the record where these instructions were given. In petitioner's opening brief to the California Supreme Court, petitioner cites an involuntary manslaughter instruction given at page 4896 of the reporter's transcript, and an instruction regarding other classes of homicides given at page 4894 of the reporter's transcript. (See opening brief, p. 155, lodged July 21, 1993, in this court.)

At page 4896, the court instructed,

> The crime of manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees, but it is of two kinds, namely voluntary manslaughter and involuntary

manslaughter.

The court went on to describe the two different types of manslaughter, RT 4897-4899. At page 4894, the court instructed,

> The word homicide means the killing of one human being by another either lawfully or unlawfully. As used in these instructions, the word homicide includes murder and manslaughter, which are unlawful and the acts of excusable and justifiable homicides which are lawful.

This court agrees that the instructions regarding manslaughter and justifiable homicides were not relevant to the facts of the case. However, their reading did not involve a violation of fundamental fairness resulting in a due process violation. This court agrees with the California Supreme Court's assessment of this issue:

> The jury was told to disregard any inapplicable instructions. Particularly in view of the abundant evidence supporting defendant's conviction of first degree felony murder with a robbery special circumstance and the absence of any inference that any inapplicable instruction improperly influenced the verdict, we discern no prejudice from the extra instructions.

Morris, 53 Cal.3d at 212-213, 279 Cal.Rptr. at 755.

Accordingly, the court recommends that this claim be denied.

E. Claim XXI: Refusal to Give Instructions Proffered by Defense

Petitioner argues that the trial court refused to give eight instructions proffered by the defense. First, petitioner claims that the trial court erred in failing to give defendant's special instruction no. 14, a modification of CALJIC 2.03, requiring the jury to apply the rule concerning false and misleading pre-trial statements to all witnesses, not just petitioner.[31/] He also

---

31. Petitioner's special instruction no. 14 provided, "If you find that before this trial any witness has made false or deliberately misleading statements concerning the charges now being tried, you should view his testimony with distrust." CT 2207.

claims the trial court erred in failing to give defendant's special instructions nos. 15 and 35, a modification of CALJIC 2.62, which required the rule that failure to explain or deny during trial testimony be applied to all witnesses, not just petitioner.[32]

The jury was instructed regarding how to evaluate the testimony of witnesses:

> Evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness but also as evidence of the truth of the facts as stated by the witness on such former occasion. If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him describing that event.
>
> Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

---

32. Special instruction no. 15 provided, "If you find that any witness has failed to explain or deny evidence in this case which contradicts his testimony and that he can reasonably be expected to explain or deny such evidence because it was brought to his attention and based on facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such contradictory evidence. In this connection, you should note that if a witness does not have the knowledge that he would need to explain or deny such contradictory evidence, it would be unreasonable to draw such an inference regarding the truth of the contradictory evidence." CT 2214.

Special instruction no. 35 provided, "If you find that a witness has failed to explain or deny any material point which he can reasonably be expected to explain or deny because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such a material point and as indicating that among the inferences which may reasonably be drawn from such a material point, those unfavorable to the witness's testimony as the more probable ones to be drawn. It should be noted that if a witness does not have the knowledge that he would need to deny or to explain such a material point, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence." CT 2217.

In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited, to any of the following:

The extent of the opportunity or ability of the witness to see , or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember, or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or non-existence of a bias, interest or other motive;

Evidence of the existence or non-existence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

An admission by the witness of untruthfulness;

The witness' prior conviction of a felony.

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars.

RT 4879-4881.

The instructions above, applying to all witnesses, carefully guided the jury how to determine credibility. These instructions addressed how to consider prior inconsistent statements as well as several other factors reflecting witness credibility. While these instructions did not specifically address the failure of a witness to explain or deny evidence which contradicted his testimony, the instructions, taken as a whole, provided sufficient guidance for those circumstances. Petitioner was not prejudiced by the failure to give his special instructions nos. 14, 15 and 35. Respondent should be granted summary judgment as to this claim.

Petitioner next claims that the trial court erred by refusing to read his special instruction no. 37, which told the jury that it must give the same full and fair consideration to petitioner's testimony as it did to other testifying witnesses.[33/] As discussed above, the jury was instructed as to how to weigh the credibility of *all* witnesses. Under these circumstances, petitioner's special instruction no. 37 was cumulative.

Petitioner next challenges the trial court's failure to give his special instruction no. 36, a modification of CALJIC 2.62, which permitted the jury to draw reasonable inferences if petitioner's trial testimony left nothing to be explained.[34/] The

---

33. Special instruction no. 37 provided, "The law makes the defendant a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness. You may not disregard his testimony merely because he is the defendant. He is presumed to be innocent until the prosecution establishes the contrary by convincing proof beyond a reasonable doubt. His testimony is entitled to full credit when you believe that he has spoken the truth and when the testimony is sufficient proof of any fact to which you believe he has testified truthfully. You should weigh the testimony by the same standards as you would weigh the testimony of any other witness." CT 2221.

34. Special Instruction no. 36 provided, "It is the constitutional right of a defendant in a criminal trial that he not be compelled to testify. In this case the defendant has given up that right and has elected to testify. If you find that the defendant has explained or denied the evidence against him introduced by the prosecution, which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take such explanation or denial into consideration as indicating the falsity of such

California Supreme Court rejected this claim as follows:

> Defendant also contends the jury should have been told that it could draw a favorable inference from defendant's testimony which explained or denied adverse evidence. The proposed instruction was both potentially misleading and unnecessary to the jury's consideration of the evidence. Merely denying adverse evidence or proffering an explanation, however implausible, does not justify an inference in defendant's favor. The jury was fully instructed as to the general factors to be used in evaluating witness credibility, e.g., internal consistency of defendant's testimony, whether it was supported or contradicted by other evidence, etc. It was therefore capable of evaluating defendant's testimony in accordance with the instructions given.

Morris, 53 Cal.3d at 213 n. 14, 279 Cal.Rptr. at 756.

This court adopts the reasoning of the California Supreme Court with respect to petitioner's challenge to the trial court's failure to give his special instruction no. 36. Respondent should be granted summary judgment as to this claim.

Petitioner next challenges the trial court's failure to give his special instruction no. 4, which provided, "An accomplice's testimony under oath is to be viewed with distrust. Accordingly, you must view evidence of an accomplice's out-of-court statements, not made under oath and made out of the presence of the jury, as even more suspect, untrustworthy and unreliable." CT 2074.

As set forth in the previous section discussing accomplice jury instructions, the trial court did instruct the jury regarding how to consider the testimony of an accomplice. The court instructed the jury that the testimony of an accomplice ought to be viewed with distrust and received with care, caution and suspicion for the reason that it's very source is tainted. (RT 4892.) The court also instructed the jury that an accomplice may have many self-serving motives that may influence his credibility such as the hope or expectation of leniency in return for testimony which would help to convict another. (RT 4892.)

---

other evidence introduced against him, and as indicating that among the inferences which may reasonably be drawn from such evidence, those favorable to defendant are the more probable ones to be drawn." CT 2125.

The court further instructed that the testimony of an accomplice which tends to incriminate the defendant ought to be viewed with distrust. (RT 4893.)

In light of the thorough instructions read regarding the weighing of accomplice testimony, petitioner's special instruction no. 4 was cumulative of the instructions given. Respondent should be granted summary judgment as to this claim.

Petitioner next challenges the trial court's rejection of his special instruction no. 33, which provided that, "If weaker and less satisfactory evidence is offered by a party when it is within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." CT 2119. In the instant petition, petitioner offers no briefing as to how special instruction no. 33 was relevant. The California rejected this claim as follows:

> He points to observations by his trial counsel that the prosecution did not produce in evidence any analysis of the types of blood found on certain rocks. But defendant fails to explain how this evidence was "stronger" or how its introduction could have aided his cause. Because defendant has not shown that the instruction he proposed related to a material matter, his assignment of error fails.

Morris, 53 Cal.3d at 214, 279 Cal.Rptr. at 756.

This court adopts the reasoning of the California Supreme Court with respect to petitioner's claim regarding his special instruction no. 33. Respondent should be granted summary judgment as to this claim.

Finally, petitioner faults the trial court for not giving his special instructions nos. 31 and 32, explaining reasonable doubt. Petitioner's special instruction no. 31 provided,

> It is not sufficient to warrant a conviction in a criminal case that the evidence is such that a man of prudence would act upon it in his own affairs of greatest importance. Men frequently act in their own grave and important concerns without a firm conviction that the conclusion upon which they proceed to act is correct; but having deliberately weighed all the facts and circumstances know[n] to them, they form a conclusion upon which they proceed to act, although they may not be fully convinced of its correctness.

> This degree of uncertainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In such cases juries should be fully convinced of the correctness of their conclusions that the defendant is guilty and that conviction should be so clear and strong to exclude from their minds all reasonable doubt that their conclusion is correct. CT 2233.
>
> Petitioner's special instruction no. 32 provided,
>
> You are instructed that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegation of the information; nor is it sufficient that it is more probable that the defendant is guilty than that he is innocent.
>
> To warrant a conviction the defendant must be proved to be guilty so clearly and conclusively that there is no reasonable doubt upon which he can be innocent when all the evidence in the case is considered together. CT 2234.

The California Supreme Court rejected petitioner's claim regarding special instructions nos. 31 and 32 as follows:

> The trial court included in its instructions CALJIC NO. 2.90, which is based on section 1096 and has been recognized as a constitutionally sound description of reasonable doubt. (People v. Crandell (1988) 46 Cal.3d 833, 881 [251 Cal.Rptr. 227, 760 P.2d 423]; People v. Rubalcava (1988) 200 Cal.App.3d 295, 300-301 [246 Cal.Rptr. 75].) No additional instructions on reasonable doubt were necessary. (§ 1096a; People v. Williams (1970) 10 Cal.App.3d 638, 644 [89 Cal.Rptr. 143].)

Morris, 53 Cal.3d at 214, 279 Cal.Rptr. at 756.

This court adopts the reasoning of the California Supreme Court with respect to petitioner's claim regarding special instructions nos. 31 and 32. Moreover, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243 (1994) (upholding California's reasonable doubt instruction from a due process challenge). Respondent should be granted summary judgment as to this claim.

F. Claim XXII: Trial Judge Failed to Give Required Sua Sponte Instructions

As observed earlier, there is a dichotomy between capital cases and non-capital cases insofar as the duty to give sua sponte instructions is concerned. However, that dichotomy is present only when the lack of a sua sponte instruction involves the essential elements of guilt or acquittal of the capital offense. Thus, the lack of a sua sponte instruction on lesser included offenses in a capital case, when evidence exists which would justify such a verdict, may offend fundamental fairness. Woratzeck v. Ricketts, supra, citing Beck v. Alabama 447 U.S. 625, 100 S.Ct. 2382 (1980). However, absent an issue regarding the giving of an instruction on elements essential to the substantive crime or penalty in a capital case, there is no such dichotomy. The failure to sua sponte give a curative or other type general instruction does not state a due process violation in either case. See Willis v. Kemp, 838 F.2d 1510, 1519-20 n.19 (11th Cir. 1988) (capital case involving a curative instruction issue). See also United States v. Multi-Management, Inc., 743 F.2d 1359, 1364 (9th Cir. 1984) (criminal case in which there was found no duty to give sua sponte instruction regarding use of other criminal acts). All of petitioner's objections to the lack of sua sponte instructions, as seen below, relate to matters not pertinent to the essential elements of the case. Therefore, the claim is not cognizable in federal habeas corpus.

Even if the merits of petitioner's claims herein are reviewed, there is evident no fundamental unfairness from the lack of a limiting instruction. Petitioner argues that the trial judge failed to read CALJIC 2.50, 17.48 and 17.02, which he was required to do sua sponte. In his opening brief filed in the California Supreme Court, petitioner describes this claim in greater detail. With respect to CALJIC 2.50, petitioner states that it instructs the jury as to the limited use of other crimes evidence. Opening brief, p. 166. In particular, it instructs the jury that such evidence is inadmissible to prove that the defendant is of bad character or has a disposition to commit crimes.[35/] In his opening brief, petitioner argued that in light of

---

35. CALJIC 2.50 (1979 Rev.) reads as follows:
Evidence has been introduced for the purpose of showing

the evidence concerning his possession of large quantities of marijuana, CALJIC 2.50 should have been given. Petitioner argued:

> Although such an instruction apparently need not be given sua sponte where the evidence is of a past offense (see People v. Collie, supra, 30 Cal.3d at 63-64), the criminal conduct here was subsequent to the homicide.
>
> Moreover, this evidence cannot be used like a prior felony conviction to impeach the appellant (See Evidence code § 1101.) Thus, it is important to distinguish the purpose for which each type of evidence is being introduced. (See People v. Rollo (1977) 20 Cal.3d 109, 123.) Without such an instruction, the jury is left to utilize the other crimes evidence for the improper purposes of undermining appellant's credibility. Under these circumstances, the error cannot be deemed harmless.

Opening Brief, p. 167.

In rejecting this claim, the California Supreme Court stated,

> Defendant asserts error in the court's omission of CALJIC No. 2.50, which instructs the jury as to the limited use of other crimes evidence. He contends that the jury's consideration of evidence related to his possession of marijuana in Nebraska prejudiced his defense. Initially, defendant did not request that this instruction be given and the trial court had no duty to

---

> that the defendant committed [a crime] [crimes] other than that for which he is on trial.
> Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show...
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
> You are not permitted to consider such evidence for any other purpose.

> give it sua sponte. (People v. Lang 49 Cal.3d 991, 1020 [264 Cal.Rptr. 386, 782 P.2d 627]; People v. Bunyard, supra, 45 Cal.3d 1189, 1225-1226 & fn. 24.) Moreover, and particularly in view of the abundant evidence of his guilt, defendant does not demonstrate how the jury's knowledge that he and his companions had harvested a few pounds of marijuana could have prejudiced his defense or made any difference in the verdicts rendered.

Morris, 53 Cal.3d at 214, 279 Cal.Rptr. at 757.

This court agrees with the California Supreme Court that the jury's knowledge of petitioner's possession of marijuana, without the benefit of CALJIC 2.50, was not prejudicial. The harvesting of the marijuana was tangential to the real issues of the case. As discussed above, in alleging the failure to give an instruction, petitioner's burden is heavy because an omission is less likely to be prejudicial than a misstatement of the law. Henderson v. Kibbe,431 U.S. at 155, 97 S.Ct. at 1736. The failure to give CALJIC 2.50 did not violate fundamental fairness resulting in a due process violation. This claim should be dismissed.

CALJIC 17.48 (1985 New) provides,

> [You [will be] [have been] given notebooks and pencils.] [You may leave them in the jury room each day and you will be able to take them into the jury room when you deliberate.]
>
> [A word of caution: You may take notes; however, you should not permit note-taking to distract you from the ongoing proceedings. Remember, you are the judges of the credibility of witnesses.]
>
> [Further,] notes are only an aid to memory and should not take precedence over independent recollection. A juror who does not take notes should rely on his independent recollection of the evidence and not be influenced by the fact that other jurors do take notes. Notes are for the note-taker's own personal use in refreshing his recollection of the evidence.
>
> Finally, should any discrepancy exist between a juror's recollection of the evidence and his notes, he

> may request that the reporter read back the relevant proceedings and the trial transcript must prevail over the notes.

Opening Brief, p. 168, n. 98.

In his opening brief, p. 168, petitioner argued that the use note of CALJIC 17.48 stated that it should be given sua sponte. He argued that not only was this instruction not given, but the trial court refused two instructions prepared by petitioner which addressed this issue. Opening brief, p. 168. With respect to this claim, the California Supreme Court observed that, "Although it is better practice to give the instruction, the trial court is not required to do so sua sponte. (People v. Harris, supra, 47 Cal.3d 1047, 1096; People v. Silbertson (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1231].)" Morris, 53 Cal.3d at 215, 279 Cal.Rptr. at 757. This court cannot find that the failure to instruct the jury regarding the use of their notes violated fundamental fairness. Because the failure to read this instruction did not result in a due process violation, it should be denied.

In his opening brief, p. 169, petitioner argued that CALJIC 17.02 provides that in multiple count cases that the jury must consider each count separately.

> In the instant case, appellant was charged in count one with first degree murder with a robbery-murder-special circumstance and in count two with robbery. (4 CT 1036-1038.) As a special circumstance is like a separate criminal offense in essence there were three separate crimes for the jury to consider. (See People v. Garcia (1984) 36 Cal.3d 539, 552.)
>
> CALJIC 17.02 reflects the fact that Penal Code section 954 allows multiple offenses to be tried together, although the trier of fact is to consider each separately. This instruction forces the jury to deal with each issue separately to ensure that a defendant's rights are protected. (See People v. Stewart (1985) 165 Cal.App.3d 1050, 1056.) Although this Court has not required such an instruction to be given sua sponte in a noncapital case (People v. Beagle (1972) 6 Cal.3d 441, 456), it is respectfully submitted that it should be given sua sponte in a capital case due to the "heightened need for reliability." (Caldwell v. Mississippi, supra, 472

U.S. at 323.)

Opening Brief, pp. 169-170.

In rejecting this claim, the California Supreme Court stated, in relevant part,

> Defendant acknowledges our rejection of his contention in a noncapital context (People v. Beagle (1972) 6 Cal.3d 441, 456 [99 Cal.Rptr. 313, 492 P.2d 1]), but asks us to reach a different result in capital cases because of the heightened requirement for reliability in decision making. (Caldwell v. Mississippi, supra, 472 U.S. at p. 323 [86 L.Ed.2d at pp. 235-236].)
>
> Under the circumstances of this case, we decline defendant's request. Although the instruction is a useful one in any case of multiple charges and is properly given on request, it was not essential to fair consideration of the straightforward and distinct charges here. There were but two charges against defendant--first degree felony murder and robbery. Defendant was accused of killing the victim in order to steal his van. A reasonable jury would have had no difficulty distinguishing between the two charges or giving them independent consideration in light of the evidence.

Morris, 53 Cal.3d at 215, 279 Cal.Rptr. at 757.

This court agrees with the reasoning of the California Supreme Court as to why this instruction was not essential to the jury's consideration of the case. Because the failure to give a sua sponte instruction on this case does not state a federal claim, and because the lack of this asserted instruction did not violate fundamental fairness, this claim should be denied.

G. Claim XXIII: Consciousness of Guilt Instruction Improperly Given

Petitioner argues that the trial judge gave an instruction that permitted the jury to consider as consciousness of guilt any allegedly false or misleading pre-trial statements. This court again refers to petitioner's opening brief filed with the California Supreme Court which expounds on this claim:

The trial court instructed the jury that:

If you find that before this trial the defendant made

> willfully false or deliberately misleading statements concerning the charges upon which he is now being tried, you may consider such statement as a circumstance tending to prove consciousness of guilt, but it is not sufficient of itself to prove guilt. (RT 4878.)
>
> The only evidence of statements made by appellant prior to trial, were statements made which implicated him and exonerated Barrett and Eckstrom. Appellant did not deny making such statements. Rather, he testified these statements were false and were made to protect his girlfriend and her sister. (RT 4603-4606.)
>
> The court's instructions, however, put appellant in an untenable situation. If the jury believed appellant's trial testimony, they nevertheless were instructed they could infer appellant's guilt based on his false pretrial statements.
>
> * * *
>
> Such a due process violation is present in the instant case. Assuming that the jury found that appellant's pretrial statements implicating himself as the sole perpetrator were false, that fact has no rational connection to an inference of guilt. To the contrary, if the jury found appellant's pretrial statements were false, such a fact would support appellant's innocence.

Opening Brief, pages 171-172.

The California Supreme Court addressed this claim as follows:

> Defendant misreads the instruction. At the threshold, it required the jury to determine whether defendant made willfully false or deliberately misleading pretrial statements "concerning the charges." If the jury found defendant made no such statements (e.g., because his pretrial admissions of guilt were true), it also necessarily found the balance of the instruction inapplicable. If, on the contrary, the jury found defendant made at least some false statements (e.g., that he did not intend to kill Van Zandt or that Barrett encouraged him to commit the crimes), it could

> reasonably infer consciousness of guilt. In either event, defendant's case was not prejudiced by the instruction. Particularly when, as here, the trial court further instructed that there may be reasons for false statements consistent with innocence, such as attempts to protect another, defendant had a fully opportunity to argue his case. There was no error.

Morris, 53 Cal.3d at 216, 279 Cal.Rptr. at 757-758.

This court agrees with the reasoning of the California Supreme Court. Petitioner is attempting to take this instruction out of context. As noted by the California Supreme Court, the jury was instructed that "there may be reasons for such false statements which are consistent with innocence. These reasons include a reluctance to appear as a witness or attempts to protect another." (RT 4886.) The reading of the challenged did not violate due process. This claim should be denied.

IV. MISCELLANEOUS GUILT PHASE ISSUES

A. Claim XV: Insufficient Evidence

Petitioner argues that there was insufficient evidence to support his first degree felony-murder conviction.

When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Under Jackson, the court reviews the entire record when the sufficiency of the evidence is challenged on habeas. Adamson v. Ricketts, 758 F.2d 441, 448 n. 11 (9th Cir. 1985), vacated on other grounds, 789 F.2d 722 (9th Cir. 1986)(en banc), rev'd, 483 U.S. 1 (1987). It is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. 307, 319. "The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." Roehler v. Borg, 945 F.2d 303, 306 (9th Cir. 1991).

Petitioner argues that the evidence provided by Barrett and Eckstrom was insufficient as a matter of law to establish that he murdered or intended to kill Van Zandt, because it was

untruthful and the result of improper plea agreements. This contention is unavailing in reviewing a sufficiency of the evidence claim because all inferences are to be drawn in favor of the prosecution's case. Petitioner further argues that even if believed, the testimony of Barrett and Eckstrom was insufficient to prove that petitioner intended to kill Van Zandt. Petitioner argues that both Barrett and Eckstrom gave testimony suggesting that petitioner had no intent to kill.

Only by the most narrow of margins was "intent to kill" even an element in petitioner's felony murder conviction. In 1983, the California Supreme Court held that if the prosecution proceeded on a theory of felony murder, the prosecution was required to establish an intent to kill in order to obtain a first degree murder, special circumstance conviction. Carlos v. Superior Court, 35 Cal. 3d 131, 197 Cal. Rptr. 79 (1983). The rule was short lived.

> We overruled Carlos v. Superior Court (1983), 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 in People v. Anderson (1987), 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306 and held that, with respect to the actual killer, the court need not instruct on intent [to kill] in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer. (Id. at pp. 1138-1139, 240 Cal.Rptr. 585, 742 P.2d 1306.)
>
> * * *
>
> Defendant stands convicted of a murder that preceded Carlos. Carlos itself concluded that the statute was ambiguous with respect to the requirement of intent to kill for a felony-murder special circumstance. (See People v. Anderson, supra, 43 Cal.3d at p. 1143, 240 Cal.Rptr. 585, 742 P.2d 1306.) There was ample basis for pre-Carlos foreseeability of a holding that such intent is not required for the actual killer. (People v. Anderson, supra, 43 Cal.3d at pp. 1138-1147, 240 Cal.Rptr. 585, 742, 1095 P.2d 1306.)

People v. Poggi, 45 Cal. 3d 306, 326-327, 246 Cal. Rptr. 886-898 (1988).

The retroactivity of the Anderson case upon appellate review was somewhat unique. In those cases adjudicating a

murder that had been committed pre-Carlos, the defendant would not have the benefit of Anderson because the defendant should not have had the benefit of an erroneous decision decided after his misdeeds. For those defendants whose committed murders occurred post-Carlos, but pre-Anderson, the rule of Carlos would apply because Carlos was the rule at the time of their misdeeds. Finally, for those defendants whose misdeeds occurred post-Anderson, the defendant could not claim application of the Carlos rule whatsoever. See Hughes v. Borg, 898 F.2d 695, 704-05 (9th Cir. 1990).

Anderson was decided in November of 1987. Petitioner committed his murder in 1985. Therefore, petitioner has the benefit of the Carlos, rule and the jury was required to find that petitioner had the intent to kill for special circumstance felony murder, and not just the intent to steal.

Contrary to petitioner's assertion, the evidence that petitioner committed felony-murder and intended to kill Van Zandt was strong. Both Barrett and Eckstrom testified that petitioner intentionally killed Van Zandt. It is clear that neither Barrett nor Eckstrom were sterling witnesses. They were both, to some degree, involved in the killing of Van Zandt. However, even disregarding their testimony, the jury also was aware of petitioner's confession to the Nebraska authorities, his statement to Tom Logan as well as his letter to Barrett. In all of these circumstances, he admitted to intentionally killing Van Zandt. Under these circumstances, the court finds that a rational trier of fact could find petitioner guilty beyond a reasonable doubt. This claim should be denied.

B. Claim XVIII: Failure to Sequester Jury

Petitioner argues that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the trial judge's failure to sequester the jury. He argues that he moved the court to sequester the jury during the trial so it would not be exposed to prejudicial publicity or other improper influences. Petitioner argues that the jury was, in fact, exposed to prejudicial outside influences. The only reference to these "prejudicial outside influences" by petitioner is a citation to (RT 4965.)

This court has reviewed page 4965 of the reporter's transcript. At this page, the judge discusses with the jury that the penalty phase of the trial is about to begin and makes the following comment:

> You are called upon once again to make some very difficult decisions in the case. It will be based on the facts that you hear in this courtroom and from no other source. I know there has been a great deal of publicity these last few days about other cases in the State of California, as well as outside the State of California. You are not to form any opinions about this case based on what you might read. Further you are not to read anything about this particular case that may or may not be published in any publication.

There is no constitutional right to jury sequestration. See Powell v. Spalding, 679 F.2d 163, 166 (9th Cir. 1982)(citing Young v. Alabama, 443 F.2d 854, 856 (5thCir. 1971). However, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury..." In Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966) the Supreme Court placed the burden on the trial court to insure that media coverage does not affect the fairness of the proceeding. In Sheppard, the court imposed a duty upon trial courts to take affirmative steps, including sequestration if necessary, to insure the fairness of criminal proceedings in the face of excessive publicity. Sheppard, 384 U.S. at 362-63, 86 S.Ct. at 1522-23.

In the instant case, the trial court acknowledged that there had been recent publicity regarding other cases which the jury should not consider. Other than this reference to the court's comments, petitioner has provided no evidence of the extent of this publicity and that it actually affected the jury. The cryptic citation to the court's comments is not sufficient evidence to oppose summary judgment. Celotex, supra. Accordingly, the court recommends that this claim be denied.

C. Claim XXIV: Caldwell Error

On April 8, 1987, when the venire appeared for voir dire, the trial judge said to the jury,

> The Supreme Court, for the last 56 cases that they have decided about the death penalty, and I'm sure all of you have read about the Supreme Court. There have been 56 cases, ladies and gentlemen, since 1972, I believe that have talked about the death penalty cases. 53 of them were reversed. In these cases, we were given guidelines--I, as a trial judge,

> was given guidelines as to how we talk to you about this matter. These guidelines are still in effect. I'm still bound by these and so are you. None of us are above the law. (RT 566.)

Later, during a break outside the presence of the jury, petitioner's counsel objected to the court's statement above. (RT 589-590.) Counsel believed that the jury might believe that since the case would be reversed in any event, the imposition of the death penalty was not an event that the jury would take as seriously as it might otherwise. The trial judge agreed with defense counsel's statement, asked what should he do, and received the request from defense counsel for a jury admonishment. Defense counsel did not ask that the jury venire to which the statement had been made be excused. The trial judge agreed to admonish the jury regarding the statement. (RT 590.) The court later told the jury,

> Ladies and gentlemen, I have been requested to admonish you a little bit about what I said in the beginning concerning the amount of cases heard by the supreme court , 56, I believe, I mentioned in number and reversals thereon.
>
> The Court, me, personally, did not mean to indicate to you one way or the other how I felt about that matter. The Court only wanted to indicate to you that those 56 cases gave us guidelines, which I am obligated to follow in cases of this nature. And that's all I intended to do. I did not intend to indicate my favor or disfavor of those decisions. I only indicated it was a threshold, the comment concerning the guidelines that we have to follow. And now I'm going to tell you about those guidelines. (RT 593.)

Defense counsel did not object to the admonishment, and the matter rested there until the issue was raised on appeal. By this court's calculation, eight of the jurors who rendered the verdict had been exposed to the judge's statement.[36/] The other jurors came from different venires.

Firstly, petitioner asked for an admonishment, not a

---

36. Jurors Lewis, Mortensen, Zifer, Lichtenwalter, Armenta, Utley, Griggs and Huber had presumably heard the judge's comments and sat on petitioner's jury.

mistrial, or the choosing of a new panel, and he received his admonishment. He should not be heard at this time to assert that the admonishment that he accepted is insufficient. However, the California Supreme Court, while mentioning counsels' non-objection to the admonishment did not clearly rule on procedural grounds that the issue was waived. Rather, the court was "reluctant to infer prejudice" because of counsel's actions. Morris, 53 Cal.3d at 182, 279 Cal.Rptr. at 735.

Petitioner argues that the trial court's initial comments diminished the jury's sentencing responsibility and amounted to error under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). In Caldwell, the prosecutor urged the jury not to view itself as finally determining whether the defendant would die, because a death sentence would be reviewed for correctness by the state supreme court. Caldwell held, on direct appeal, that the prosecutor's statement amounted to reversible error because "it is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere." Id. at 328-29.

Nevertheless, the court finds that the trial court's potentially very serious mistake, was not prejudicial in the Brecht sense. The court's initial comments could have misled the jury to believe that 53 out of 56 death penalty case that went before the California Supreme Court were reversed, implying to the jury that it did not matter whether they imposed the death penalty because they would be reversed by the California Supreme Court. However, the trial court went on to give a curative explanation regarding the reason for mentioning the reversals. The court reiterated that the California Supreme Court, in those 53 reversals, had set forth guidelines for the courts to follow. Although this explained why the court had mentioned the 53 reversals in the first place, it still did not remove from the jury's thoughts the fact that most death penalty cases in California were reversed.

In mentioning the 53 reversals, the trial court was referring to the California Supreme Court as led by Chief Justice Rose Bird. In the fall of 1986 Chief Justice Bird and two other justices (Grodin, Reynoso) were voted off the court by the voters of California in a highly publicized election. The Bird court was strongly criticized by some for the failure to uphold death penalty decisions.

The court is tempted to find that the general populace, and these jurors as well, were well aware of the state supreme court's death penalty reversal rate, and that the trial court did not relay information not already known by the potential jurors. However, with surveys that tell us that a substantial percentage of the American populace do not know the identity of the Vice President of the United States, or where to locate Argentina on a world map, the court cannot take judicial notice that well publicized facts were nevertheless widely known, and known to these jurors. And, while the general criticism of the "Bird" state supreme court may have been known, the actual 94%+ reversal rate was probably not known.

Nevertheless, the court finds the holding of the state supreme court as to lack of prejudice persuasive in the following respects. The admonishment, although not directly responsive to the potential prejudice, appeared to satisfy defense counsel who was on the scene, and who had initiated the admonishment in the first place. The jury was told by the court that it would have a difficult decision to make at the penalty phase. Defense counsel argued the seriousness of the jury's task at length. (See e.g. RT 5306.) It was also instructed that a "death verdict means exactly what it says. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror." (RT 5341.) Moreover, the jurors were extensively voir dired on their thoughts about the death penalty, and this questioning was bound to have imparted a sense of responsibility about the jury's role in this case.

Viewing the comments in this context, this court finds that the jury was not substantially influenced by the admittedly improper comments of the trial judge made at the inception of the case and the error was not sufficiently harmful.

V. PENALTY PHASE ISSUES

A. Claims XXVII, XXVIII: Challenges to Evidence Admitted at Penalty Phase

1. Claim XXVII: Admission of Evidence re: Facts Underlying Petitioner's Prior Convictions

Petitioner argues that admission of evidence regarding the

facts of his prior criminal conduct for which he was not charged or convicted violated the Fifth, Sixth, Eighth and Fourteenth Amendments. Petitioner argues that the prosecutor was permitted to go beyond the record of the prior convictions and introduce additional testimony concerning these events. Petitioner also argues that his counsel was ineffective for stipulating to the validity of the prior convictions.

In particular, petitioner argues that retired Oroville Police Officer Carl Spinale, the investigating officer on the 1980 kidnaping, was permitted to testify about the kidnaping and related events. Petitioner argues that his former girlfriend, Theresa (Williams) Pugh, was allowed to testify regarding the 1978 kidnaping, attempted rape and assault with intent to commit rape convictions. Petitioner cites RT 4970-81 for Officer Spinale's testimony and RT 4983-93 for Pugh's testimony. The court will summarize their testimony below.

Officer Spinale testified that on February 5, 1980, he interviewed petitioner regarding a kidnaping he was investigating. (RT 4970.) Petitioner told him that he was in a Raley's parking lot in Oroville waiting to take a person's car. (RT 4972.) After a woman got into her Pinto, he got a knife, shoved it in her side and told her to move over. (RT 4972.) After she moved over he told her that he wanted her car. (RT 4973.) He told the woman that his girlfriend was across the street at Fulton Tire Company waiting for him to get the car and pick her up. (RT 4973.) Petitioner apparently entered the vehicle and told the woman to drive. When they approached Meyer Street, he told her to stop. (RT 4973.) Petitioner's girlfriend got in the car and then they drove to a motel where petitioner and she were staying. (RT 4973.) The girlfriend went into the motel, got her luggage and got back into the car. (RT 4973-4974.) They then drove onto the freeway. (RT 4974.) As they were driving, petitioner asked his girlfriend if she wanted to stick to the plan, which was to take the woman to the rock piles and leave her there. (RT 4974.) Petitioner stated that the first plan had been to have the woman take her clothes off, then tie her up. (RT 4974.)

When they got to the rock piles, the woman got out. (RT 4974.) The woman asked if she could have some of her stuff, so they threw her some of the things she needed. (RT 4974.) Petitioner and his girlfriend then drove to Marysville. (RT 4974.) They then took all of the money out of the woman's purse and bought food at a Frostie Freeze. (RT 4974.) They

then drove to Sacramento and called the girlfriend's father to come get her because she was pregnant. (RT 4974.) Petitioner then drove to Auburn where he was arrested. (RT 4974.)

Pugh testified that on September 26, 1977, she was fifteen years old. (RT 4983.) On that day as she was walking home from school, petitioner drove up on his motorcycle and started harassing her. (RT 4984.) She had stopped dating petitioner eight months earlier. (RT 4985.) Petitioner grabbed her hair and asked her to get on the bike or he would drive off with her hair in his hand. (RT 4986.) Pugh then got on the motorcycle. (RT 4986.) They drove to Dyers Lane. (RT 4986.) When they arrived, petitioner tried to force her to kiss him. (RT 4987.) He also touched her breasts. (RT 4987.) When she told him to stop, he said he did not have to. (RT 4987.) He then touched her in her vaginal area. (RT 4987.)

She got off the bike and started walking toward home. (RT 4987.) He then came after her on foot. (RT 4987.) Petitioner grabbed her and she ended up on the ground. (RT 4987-88.) He then began pulling her pants down and slapping her because she was screaming. (RT 4988.) He also bit her on the shoulder. (RT 4988.) As he tried to have intercourse, a car came down the street. (RT 4988.) She ran to the car and they took her home. (RT 4989.) She was scared, crying and dirty. (RT 4989.)

Petitioner argues that his counsel's stipulation to the convictions in the absence of investigation to determine their validity constituted ineffective assistance of counsel. Petitioner alleges that had counsel investigated the prior convictions, they would have found them unconstitutional for several reasons. First, petitioner claims he was not competent to have been tried in 1980 due to his longstanding organic brain damage. Petitioner also argues that he was incapable of formulating the mental state necessary for conviction in the 1980 case. Petitioner further argues that investigation by trial or appellate counsel would have uncovered evidence which would have impeached the truth and veracity of Theresa (Williams) Pugh's testimony and shown that during the late 1970's she had a relationship with petitioner of which her father disapproved. Petitioner alleges that her prior testimony to authorities and family was substantially influenced by this disapproval.

The court pauses to describe the legal standards for ineffective assistance of counsel. The United States Supreme Court has recently described the standards this court must apply

to an ineffective assistance of counsel claim. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). Previously, the test for demonstrating ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984), and this test survives. First, a petitioner must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690. The federal court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id. "We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland at 689).

Second, a petitioner must affirmatively prove prejudice. Strickland at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

In Fretwell, however, the Supreme Court has emphasized other language from Strickland to further define what is necessary for a petitioner to prove the prejudice prong of his ineffective assistance of counsel claim, almost adding what appears to be a third prong to the analysis. The Fretwell Court held that prejudice concerns not only whether the outcome would have been different but for counsel's errors, but more importantly evaluates
whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness.

> Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 113 S.Ct. at 842. Therefore, if the court

finds that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's unprofessional errors, the result of the proceeding would have been different, the court must then ask whether despite the errors and prejudice, was the trial fundamentally unfair or unreliable.

During a California penalty phase proceeding, the defense may collaterally attack the validity of prior convictions. Garcia v. Superior Court, 14 Cal.4th 953, 59 Cal.Rptr.2d 858 (1997). Thus, a claim for ineffective assistance of counsel for failure to attack prior convictions utilized in the penalty phase is legally cognizable in the abstract. Petitioner argues here that his organic brain damage demonstrated that he was incompetent to proceed in the previous cases, and that his counsel should have attacked the verdict on those grounds. However, petitioner must demonstrate in this habeas action that there is some evidence from which this court could conclude that defense counsel should have attacked the prior convictions on such a basis. As discussed at length in the introductory sections to these Findings, petitioner cannot simply argue that such a grounds exists and expect the court to award an evidentiary hearing on a silent record.

As discussed above, and infra, petitioner has offered no evidence that he suffered from organic brain damage to a degree that would invalidate his prior convictions. Not only is the federal record silent with respect to such a showing, the penalty phase evidence produced by petitioner at his trial on the subject of his organic brain damage totally fails to rise to a level where a person's competency would even be questioned. The court has reviewed the penalty phase transcript in its entirety. Witness Carroll, a clinical psychologist, testified to "mild to moderate" brain dysfunction. (RT 5098.) Witness Globus, a psychiatrist, who is known to the court from prior proceedings, and who is not one afraid to advance strong opinions, testified to brain damage of a non-specific degree resulting in a normal IQ, but an "adjustment disorder." This testimony was fairly contemporaneous to the period in which petitioner committed all his crimes, and goes no distance in proving petitioner's inability to comprehend the nature of legal proceedings or his inability to assist his counsel. Indeed, as discussed before, petitioner, under oath, conceded his ability to assist his counsel in this trial. Claim XIII supra. Petitioner does not explain how he became "cured" of his brain damage to sufficiently assist his

counsel herein. In any event the testimony as to petitioner's deficits could not even persuade a jury to find such a condition a sufficient mitigating factor. Petitioner's organic brain damage argument becomes frivolous when stretched to the point of alleging mental incompetence.

The point is– if petitioner was not incompetent in 1987, he was most likely not incompetent to assist his trial counsel in previous cases. Organic brain damage, if it exists, does not generally cure itself. Petitioner was obviously not incompetent to stand trial for any of his convictions.

Furthermore, petitioner has offered no evidence to support his claim that Theresa Pugh was motivated by disapproval from her father to a degree that made her allegations against petitioner with respect to the kidnaping suspect.

Because petitioner has offered no evidence to support these allegations, the court cannot find that he was prejudiced by counsel's failure to challenge the admissibility of his prior convictions on these grounds. See Celotex Corp., 477 U.S. at 324. Accordingly, this ineffective assistance claim should be denied.

Petitioner argues that introduction of evidence regarding these two prior convictions violated Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987) and Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991) because the prosecutor introduced victim impact evidence concerning these offenses and argued constitutionally impermissible inferences from such evidence during his penalty summation.

In Booth v. Maryland, the Supreme Court held that victim impact statements were inadmissible during the penalty phase of capital jury trials. Booth, 482 U.S. at 504, 107 S.Ct. at 2533. In Payne, the Supreme Court overruled Booth, holding that, "the Eighth Amendment erects no per se bar" on "the admission of victim impact evidence and prosecutorial argument." Payne, 501 U.S. at 827, 111 S.Ct. at 2609. At the time of petitioner's trial, Booth was the law. Nevertheless, even assuming for the moment that the prosecutor introduced or argued victim impact information, the new rule stated by Payne may be applied to petitioner. The Teague new rule bar, because of its reasoned underpinnings, applies only to the petitioner (who has no interest in the finality of court decisions), and does not apply to the state. Lockhart v. Fretwell, 506 U.S. 364, 372-373, 113 S.Ct. 838, 844 (1993). Thus, the Payne rule can be applied to petitioner's argument.

Moreover, the testimony set forth above clearly does constitute victim impact testimony. Officer Spinale testified regarding what petitioner had told him regarding the 1980 kidnap. Theresa Pugh's testimony was limited to a description of the facts surrounding the 1978 offense. Clearly, the testimony of Officer Spinale and Theresa Pugh did not constitute victim impact testimony.[37]

Petitioner argues that the prosecutor made improper argument, although he does not cite to the record where this argument was made. After reviewing the record, it appears that petitioner may be referring the following argument:

> What about Mr. Morris' two other violent crimes which you have both heard testimony about and the certified copy of the convictions that have been introduced into evidence. We have the first–we have, first, the kidnap and attempted rape of Miss Theresa Williams. There was no knife used, there was no guns or rocks. This crime was committed by Mr. Morris, an adult male, on a 15 year old female. He didn't need other weapons to commit the crime. As to what could have happened if that car had not come along, that's subject to speculation., But the crime, in and of itself, was a vicious crime committed on a 15 year old girl. (RT 5288.)

This argument focused on the nature of the 1978 kidnap and not on the impact on the victim. Because it was not improper, this claim should be denied.

Petitioner next argues that his due process rights were violated by admission of evidence of uncharged and unproven violent criminal conduct in connection with the 1978 and 1980 offenses. As noted by the California Supreme Court, petitioner points to nothing in the record of his prior crimes that amounted to an inaccurate rendition of his prior criminal acts. Morris, 53 Cal.3d at 218, 279 Cal.Rptr. at 759. This court agrees. Because this claim is unsupported, it should be denied.

Petitioner next argues that to the extent that the prosecutor relied on prior convictions for proof that he should be put to

---

37. Victim impact testimony generally includes evidence relating to the victim's personal sufferings and the emotional impact on the victim's family. See Payne, 501 U.S. at 826-828, 111 S.Ct. at 2608-2609.

death, double jeopardy and collateral estoppel principles were violated because he was twice punished for the same offense. A sentence enhanced by reference to a prior conviction is not a "second punishment" for the first crime; it is a punishment for the new crime, tailored to persons who have not responded to lesser sanctions. United States v. Shaw, 26 F.3d 700, 701 (7th Cir. 1994). Petitioner's double jeopardy argument is without merit and should be denied.

Petitioner argues that his death sentence violated equal protection because non-capital sentencing does not allow for consideration of "such evidence." It is unclear what evidence petitioner is referring to–the alleged uncharged acts evidence or the prior conviction evidence. As discussed above, the testimony of Officer Spinale and Theresa Pugh did not involve uncharged acts. Therefore, petitioner must be claiming that non-capital sentencing does not allow for consideration of prior convictions. Because non-capital sentencing does allow for consideration of prior convictions, this claim is legally frivolous and should be denied.

In paragraph I of this claim, petitioner argues that his death sentence was imposed in violation of his due process right to an unbiased jury because the sentencing jury was the same jury that determined his guilt. The Supreme Court has held that a state may constitutionally employ a plan that provides for the same jury to sit in both the guilt and penalty phases of a capital murder trial. See Lockhart v. McCree, 476 U.S. 162, 180-81, 106 S.Ct. 1758, 1768-69 (1986). Accordingly, this claim should be denied.

2. Claim XXVIII: Admission of Evidence in Aggravation Without Proper Notice

Petitioner argues that under California law (Cal. Penal Code § 190.3)[38] he was entitled to pretrial notice of any and all

---

38. Petitioner could not have stated a claim directly under the federal constitution. In Gray v. Netherland, 518 U.S. 152, 164-66, 116 S.Ct. 2074, 2082-2083 (1996), the Supreme Court held that a claim based on a failure to give notice of evidence to be used at a capital habeas phase would require the statement of a new constitutional rule. Because of this court's finding that no state law was violated, the court need not analyze whether Cal.Penal Code § 190.3's requirement of evidence notice creates a

evidence to be presented by the prosecution in aggravation. Petitioner claims that the trial court improperly admitted the testimony of Officer Spinale and Theresa Williams without the pretrial notice required under California law. Immediately prior to the testimony of Officer Spinale and Theresa Pugh, petitioner's counsel argued that he had not received notice of uncharged criminal activity. (RT 4948.) It is on this argument that petitioner bases the instant claim.

After reviewing the record, it appears that petitioner has misinterpreted counsel's argument. To put this in context, the court will below set forth the discussion leading up to counsel's objection:

> Prosecutor: Your Honor, I had anticipated going into with witness Theresa Pugh, going into some of the details of the offense and also some prior violent acts on the part of Mr. Morris. Apparently, as an offer of proof, two times before he was in fact charged with the attempted rape and assault with attempt to commit rape, kidnaping, there were incidents involving Mr. Morris taking Mrs. Pugh or Ms. Pugh against her will to Oregon. During this trip she was assaulted repeatedly by Mr. Morris. There was a subsequent incident to that in which Mr. Morris came upon her and another individual and he violently attacked her and injured her. These were some time six to seven months prior to the final matter that has been alleged in this case. As far as the kidnap of the –1980 conviction for kidnap, the People intended to go into the fact that Mr. Morris was the one who did commit this crime, and secondly go into how it was done, the violence that was used, the fact that it was an elderly lady, 61 year old lady, involved in this crime, as compared to a 15 year old child involved in the prior crime, the assault. And that's basically it.
>
> Court: Mr. Condit?
>
> [Petitioner's Attorney]: With reference to the uncharged criminal activity that Mr. Rossi refers to, I believe the first time that he mentioned that he was

---

Fourteenth Amendment liberty interest cognizable in federal habeas.

going to go into that was the other day when I called him on the phone to tell him about these motions. I don't–you know, we would object on grounds that we did not get notice that 190.3 requires as to those uncharged criminal activity offenses and that consequently we have not investigated them and are not prepared to defense them. And they have never–you know. So we think that it would deny the defendant due process to allow Mr. Rossi at this point to bring out evidence of them. As far as the–putting on the victim of the rape, that is the subject of our motion. It seems to me that the prosecution really gets two bites at the apple when he gets to prove it by way of documentary evidence and then gets to prove, put on some evidence of it. And since by reason of the fact that the person was convicted of it, the jury's likely to believe that anything that the victim might say about it is true, I think the defense is put to a distinct disadvantage.

.....

[Prosecutor]: Your Honor, my position would be that they–these prior events were culminated in the rape that he was in fact charged and tried and convicted for and that they are part and parcel, part of that whole series of events which I did give counsel notice that I would plan to go into it at the penalty phase.

[Petitioner's Counsel]: We think the notice–

Court: The rape only–

The Reporter: I'm sorry, I didn't get your response.

[Petitioner's Counsel]: You know, *we read the notice that he was going to prove the rape, the fact of the rape conviction and the kidnaping conviction.*

[Prosecutor]: I would rely on the statute in that the statute is pretty broad in stating what can be presented in regards to violence.

> The Court: I don't think there's any problem about how broad the statute is. But I do believe that in order to prepare an appropriate defense in the penalty phase, the defendant is going to have to know what's going to be presented against him so he can buttress whatever information and whatever knowledge he has. So what the Court is going to do is we're going to allow you to put on evidence only with reference to the rape and only with reference to the kidnap. We will not allow you to present evidence and circumstances that led up to those charges. The Court would find that those matters are irrelevant with reference to the charges and should be excluded in the penalty phase. (RT 4947-4951.) (emphasis added).

Petitioner has clearly misinterpreted the circumstances surrounding this claim.[39] Petitioner's counsel objected to not receiving notice regarding the uncharged acts which occurred prior to his kidnap of Theresa Pugh. Counsel did receive notice of the previous convictions and acts directly related to the convictions. The trial court granted counsel's motion to exclude evidence of these uncharged acts on grounds that counsel had not received adequate notice. Because this claim is not supported by the record, it should be denied.

B: Claim XXIX: Prosecutor Committed Misconduct in Examining Defense Mitigation Witnesses and During Closing Argument

Petitioner alleges that the prosecutor committed misconduct in examining defense mitigation witnesses and during his penalty phase closing argument. This court earlier found that the only portion of this claim not procedurally defaulted was the allegation that cross-examination of Reverend Eshelman regarding whether petitioner was a dangerous man violated due process. The court will address this claim first.[40]

---

39. This misinterpretation may also explain some of the confusion with respect to claim XXVII discussed immediately above.

40. See July 2, 1997, order.

Cross-Examination of Reverend Eshelman

Petitioner argues that the prosecutor asked defense mitigation witness Reverend Byron Eshelman if petitioner was a dangerous man. Petitioner argues that this violated the California decisional prohibition on evidence concerning future dangerousness and hence violated a liberty interest pursuant to Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980).[41]

In Hicks v. Oklahoma, the Supreme Court held that state laws giving a defendant significant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. Hicks, 447 U.S. at 346, 100 S.Ct. at 2229. Therefore, when a state has provided a specific method for the determination of whether the death penalty shall be imposed, "it is not correct to say that the defendant's interest" in having that method adhered to "is merely a matter of state procedural law." Hicks, 447 U.S. at 346, 100 S.Ct. at 2229. Petitioner is apparently arguing that the failure to abide by the California prohibition on evidence concerning future dangerousness resulted in a due process violation pursuant to Hicks.

The court need not determine whether California law creates a liberty interest in an area of claimed evidence preclusion, in that the easier route of adjudication is the clear non-violation of state law in any event. The California Supreme Court held in this case that questions by the prosecutor related to evidence regarding future dangerousness

---

41. As was the case with the previous claim, petitioner could not state a claim for direct violation of the federal constitution. The Supreme Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in the criminal justice system. See Jurek v. Texas, 428 U.S. 262, 275 (1976)(noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); California v. Ramos, 463 U.S. 992, 1003 n. 17 (1983)(explaining that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society".

were not actionable under California law.[42]

---

42. The California Supreme Court found that no state law violation had occurred:

> Defense counsel did object to the following question directed to Reverend Eshelman, a psychologist and former prison chaplain called as an expert by the defense: "In your opinion, as Mr. Morris sits here today, is he a dangerous man?" The objection was sustained and the prosecutor dropped the line of inquiry. In view of Eshelman's direct testimony, there was no misconduct. Eshelman's direct testimony, there was no misconduct. Eshelman offered his opinion, based on his training as a psychologist and his more than 20 years as a prison chaplain, that defendant was a sensitive and personable man who had a "proven ability to get alone and adapt" in a prison environment. According to Eshelman, defendant had participated in prison chapel programs, was one of the highest producers in prison industries, and was cooperative and pleasant. He compared defendant favorably to life sentence prisoners he had known who had made a positive contribution to prison life. While the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief (Adcox, supra, 47 Cal.3d at p. 257), it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future. (People v. Gates, supra, 43 Cal.3d at p. 1211; People v. Coleman (1989) 48 Cal.3d 112, 150 [255 Cal.Rptr. 813, 768 P.2d 32].) As we said in Gates, If the defense chooses to raise the subject, it cannot expect immunity from cross-examination on it." (43 Cal.3d at p. 1211.)
>
> As in Gates, 43 Cal.3d 1168, the prosecutor's question was a permissible attempt to challenge defense expert evidence. [footnote omitted.] Moreover, we note that the question was an isolated one that does not support an inference of prejudice and that any conceivable prejudice could have been cured by a timely admonition, which was not requested by the defense. (E.g., People v. Rich (1988) 45 Cal.3d 1036, 1089-1090 [248 Cal.Rptr. 510, 755 P.2d 960]; People v. Hendricks (1988) 44 Cal.3d 635, 649-650 [244 Cal.Rptr. 181, 749 P.2d 836].) In

Petitioner cannot ask this court to overrule the California Supreme Court on an issue of state law. Because no state law was violated, no liberty interest can arise concerning an alleged violation of the law at issue. Accordingly, this claim should be denied.

Defaulted Claims

The court found that the remaining portions of claim XXIX were procedurally barred (i.e. challenges to prosecutorial misconduct in connection with questioning of Warden White and Dr. Carroll, and prosecutorial misconduct in connection with closing argument alleged in paragraphs D, E and F of the Amended Petition). The court ordered that petitioner had failed to demonstrate cause for the default as to these claims, but that it would defer determination of actual innocence as it applied to the penalty phase claims pending further review of investigative requests and the merits briefing. (See May 27, 1997, findings and recommendations, p. 22, p. 32.) The court now turns to that analysis.

As stated in the May 27, 1997, findings and recommendations, previous Supreme Court cases have held, in the habeas context of procedural default, that the "not guilty of the offense" concept, a.k.a. "actual innocence," requires that one be permitted to prove "actual innocence of the death penalty" for assertions of error at a penalty phase.[43] Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992). Actual innocence is defined in Sawyer as "petitioner has shown by clear and convincing evidence that but for constitutional error no reasonable juror would find him eligible for the death penalty under Louisiana law." Sawyer, Id.. At 348. Actual innocence of the death penalty must focus on eligibility for the death penalty and not on additional mitigation. Sawyer, Id.

In order to put the challenges in the defaulted claims in context, the court will first summarize the aggravating evidence

---

sum, we find no misconduct in the prosecutor's examination of the defense expert witnesses that would justify a reversal.

Morris, 53 Cal.3d at 219-220, 279 Cal.Rptr. at 760.

43. The procedural default legal standards are set forth in the May 27, 1997, findings and recommendations. They will not be repeated here.

submitted against petitioner during the penalty phase. First, the court informed the jury that petitioner had been previously convicted of kidnaping, attempted rape and assault with intent to commit rape in 1978. (RT 4969.) The court also informed the jury that in 1981 petitioner had been convicted of kidnaping. The prosecutor then called Officer Spinale and Theresa Pugh to testify regarding the events surrounding the 1978 and 1981 convictions.

The court will now address the claims found procedurally defaulted. First, petitioner alleges that during cross-examination of Warden Wilson the prosecutor asked him whether he had spoken to victims' families about tragedies they had suffered which led people to being sentenced to death and executed. Petitioner also complains that the prosecutor asked the Warden about the murder rate in prison and about instances of guards and inmates being murdered. In particular, the prosecutor asked,

> Prosecutor: In your opinion, is the murder rate higher in the prison system than it is in the general public?
>
> Warden Wilson: Per capita speaking?
>
> Prosecutor: Per capita, yes.
>
> Warden Wilson: Yes, there was a time about three years ago, it was per thousand, it might have been higher. I don't know. I don't have any idea about that. I haven't seen the statistics.
>
> Prosecutor: A person–you gave an opinion as to Mr. Morris' ability to adjust in the prison system. Did you consider Mr. Morris' propensity towards violence?
>
> Warden Wilson: Yes, Yes.
>
> Prosecutor: Do you feel that in the prison system, he would have an opportunity to kill again?
>
> Warden Wilson: There's always a possibility. (RT 5056-57.)

The prosecutor went on to ask:

Prosecutor: What about a situation where lifers have killed other inmates or guards?

Warden Wilson: Well, I can't recall a lifer doing this. A man who is doing life without possibility of parole, I don't know of a case like that.

Prosecutor: Where a man that is serving life without the possibility of parole–

Warden Wilson: Has killed a guard, yes.

Prosecutor: Or an inmate?

Warden Wilson: I'm not sure.

Prosecutor: Are you familiar with the Deuel Vocational Institution?

Warden Wilson: Yes, somewhat.

Prosecutor: Are you familiar with the number of murders that occur at Deuel Vocational Institution?

Warden Wilson: Well, I'm not familiar with the last year or so. But they have had their share down there.

Prosecutor: How about San Quentin?

Warden Wilson: San Quentin, a number of years ago, had their share.

Prosecutor: Okay. Are you familiar with the number of murders that have been committed by lifers, people that are serving life terms at San Quentin, within the last five years?

Warden Wilson: No.

Prosecutor: Last ten years?

Warden Wilson: No. (RT 5061-5062.)

The prosecutor also questioned Warden Wilson about whether he had spoken to victims' families:

> Prosecutor: How many families of victims that these people have murdered and killed and robbed and whatever have you talked to?
>
> Warden Wilson: Well, I don't quite catch the thrust of the question, sir.
>
> Prosecutor: You are testifying from a certain vent that you have talked to these people that are on death row. Have you ever talked to the victims' families of what the tragedy these victims' families have went through because of the actions of these men that are, in fact on death row?
>
> Warden Wilson: No, I haven't. But I understand exactly their position. Nobody wants a loved one killed. (RT 5064-5065.)

This court cannot find that but for this testimony, petitioner would have been found actually innocent of the death penalty. Warden Wilson did not testify that the circumstances of petitioner's crime made it likely that he would murder someone again. The inference from his testimony that there was "always a possibility" that petitioner could kill again in prison was that it was actually not likely that petitioner would kill again. Accordingly, this claim should be dismissed.

Warden Wilson also testified that he had not talked to victims' families but that he understood "exactly their position." This comment stated the obvious and its importance in the jury's consideration of the death penalty was negligible. Because petitioner would not have been found actually innocent of the death penalty but for this comment, this claim should be dismissed.

Petitioner next alleges that the prosecutor asked defense mitigation witness Dr. Carroll whether petitioner was a dangerous man. The prosecutor asked Dr. Carroll, "As Mr. Morris sits here today, do you feel that he's a violent, dangerous individual?" (RT 5109.) Petitioner's counsel immediately objected to the question and the prosecutor withdrew it. (RT 5109.) Because the question was withdrawn,

it is unclear how it could have possibly affected the jury's consideration of the death penalty. Because petitioner would not have been found actually innocent of the death penalty but for this question, this claim should be dismissed.

In paragraph D, petitioner alleges that during closing argument, the prosecutor made eight improper comments. First, he alleges that he exhorted the jury to disregard constitutionally relevant mitigation in that he told the jury that they could not consider whether petitioner could function in prison. In particular, the prosecutor argued,

> In conclusion, the defense presented three witnesses with varying degrees of experience throughout the penal systems in California. If you noted, two of them, their experience was extremely dated. One of them testified that he had more recent experience. All of which admitted and testified that they were in fact paid witnesses for the defense. All of which agreed that Mr. Morris would do fine in prison, in a citizen-supported California institution. I ask you, ladies and gentlemen, how on earth does that mitigate the vicious murder of Mr. Van Zandt? Remember, you are supposed to be looking at factors in mitigation of his crime and his crimes, not whether Mr. Morris could function in prison. Please remember this after you've been instructed on the applicable law and consider that in your deliberations. (RT 5284.)

In evaluating this claim, the California Supreme Court stated,

> Although defendant reads this remark as an attempt to instruct the jury that prison adjustment cannot be a mitigating factor, in context, it amounts to no more than criticism of the mitigating evidence in light of the aggravating evidence. The prosecutor was entitled to argue (based on evidence in the record) that predictions of satisfactory adjustment to prison life are outweighed by a history of violent crimes, just as the defense was entitled to argue the opposite. (People v. McDowell, supra, 46 Cal.3d at p. 571; People v. Thompson, supra, 45 Cal.3d at pp. 124-125.)

Morris, 53 Cal.3d at 221, 279 Cal.Rptr. at 761.

As stated above, actual innocence of the death penalty must focus on eligibility for the death penalty, and not merely on additional mitigation, or some other isolated aspect of the penalty phase hearing. Sawyer, 505 U.S. at 345-47, 112 S.Ct. at 2522-2523 In other words, the habeas court must determine that the overall penalty phase was irreparably tainted in order to find "innocence of the death penalty." Whether petitioner could function in prison was clearly a mitigating factor; however, the assertion of a mitigating factor can certainly be denigrated in counter-argument by the prosecution.

Petitioner next complains that the prosecutor misadvised the jury about how the petitioner's background evidence was to be evaluated in that he said that petitioner's background did not "mitigate the crime that is before you today." In support of this claim, petitioner cites page 5283 of the reporter's transcript. Here, the prosecutor argued,

> Further, there was testimony from the family in regards to Mr. Morris' artistic abilities. The defense admitted these works of Mr. Morris and it's going to be up to you to reach a conclusion as to their relevancy and whether they offer any mitigation for Mr. Morris' conduct. There was testimony from Mr. Morris' parents that because he was a problem child, he had to be disciplined both by the mother and father on many occasions. The discipline used by the parents may or may not have been reasonable, but you have to draw your own conclusions about that. And, again, that conduct, how that mitigates the crime that is before you today. Moving on to the psychiatric and the clinical psychologist testimony. They both agreed that Mr. Morris suffered from mild cerebral dysfunction or what is commonly known today as attention deficit disorder. There were no witnesses presented by the People to refute their conclusions, but I ask you to think back to the cross-examination of these witnesses. Consider their financial bias.. And on cross-examination, I feel that it was very obvious that a great number of the children in this country today, as well as when Mr. Morris was growing up, suffered from a similar type of defect. They are not on trial because they have not committed the crimes that Mr. Morris has committed. Lastly, you must decide whether this attention deficit

> disorder, or whatever you call it, mitigates the vicious crimes that Mr. Morris has committed in his brief 30 years of existence. (RT 5283-5284.)

Again, petitioner's argument of misconduct by the prosecutor because he argued against the existence of sufficient mitigating factors, or as here, essentially told the jury that they would have to decide the issue, is frivolous. The prosecutor would have no function at all at the penalty phase if petitioner's arguments were correct.

Petitioner also argues that the prosecutor improperly argued that the absence of Factor H evidence–petitioner's mental capacity–was an aggravating factor. The prosecutor argued that, "And especially factor 'H,' whether or not at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were impaired as a result of mental disease or defect. I'll submit to you ladies and gentlemen, Mr. Morris did probably have a learning disorder, but his disorder did not reach the level that he was unable to appreciate his criminal conduct and conform his conduct to the requirements of law. He knew what he was doing." (RT 5285-5286.)

In evaluating these claims, the California Supreme Court stated,

> Defendant characterizes another portion of the prosecutor's argument as an attempt to turn alleged mitigating factor (defendant's lack of capacity to conform his conduct to the requirements of the law) into an aggravating factor. In the same vein, he claims that the prosecutor disregarded uncontradicted defense expert testimony concerning defendant's mental state. Defendant distorts the prosecutor's argument. The prosecutor did not claim that defendant's mental capacity aggravated his crime; he merely challenged the testimony of defendant's experts and argued defendant's state of mind from the evidence. Because the jury was not bound to accept the views of defendant's experts, the prosecutor's argument was proper. (People v. Drew (1985) 22 Cal.3d 333, 350 [149 Cal.Rptr. 275, 583 P.2d 1318].) Again, there was no misconduct.

Morris, 53 Cal.3d at 222, 279 Cal.Rptr. at 762.

This court agrees with the California Supreme Court that the argument was not improper. Furthermore, as the argument went to mitigating factors, it did not go to petitioner's actual innocence of the death penalty. Sawyer, supra. Accordingly, these claims should be dismissed.

Petitioner next argues that the prosecutor invited improper evidentiary comparisons by arguing that Rickey Van Zandt's mother felt her son should not have gotten the death penalty. The prosecutor argued, "It was obvious early on from the testimony of Mrs. Van Zandt, the mother of the victim in this case, she neither felt that her son should be given the death penalty." (RT 5283.)

The California Supreme Court addressed this claim as follows:

> [T[he prosecutor recalled the testimony of defendant's family, who offered the view that he did not deserve the death penalty. He then referred to Van Zandt's mother, remarking that she likewise felt her son did not deserve the death penalty.
>
> Neither Booth v. Maryland nor Gathers v. South Carolina requires reversal here. Although the first comment does refer to Van Zandt's mother, it does not refer to her character or the specific impact of her son's homicide on her life, except to state the obvious: that her son was killed. In context, the comment was an attempt at *reductio ad absurdum*–the prosecutor was simply pointing out that relatives' natural feelings are inclined to leniency and should not be given substantial weight in a penalty determination.

Morris, 53 Cal.3d at 221, 279 Cal.Rptr. at 761.

Of course, as observed earlier, Booth is no longer the law, and after Payne, evidence of victim impact is quite appropriately part of the prosecutor's penalty phase case if state law does not prohibit such. And the prosecutor's reference here to victim impact was mild and obvious. With or without the prosecutor's argument, the jury knew that Mr. Van Zandt's mother suffered as a result of her son's death. Finally, the California Supreme Court did not consider the prosecutor's actions to be a violation of state law.

Petitioner argues that the prosecutor improperly argued that the jury should consider the anguish and emotional scars suffered by the victim of petitioner's 1980 crime, though no such evidence had been admitted. The prosecutor argued,

> In 1980, what did he do? Again, he also wanted a vehicle. What did he do? He slid in next to a 61 year old lady, put a knife to her side and took her vehicle. What about the anguish and the emotional scars that the victim of that crime suffered throughout the course of a kidnaping and in the year prior to her death. I ask you, what kind of person, a big and strong male, such as Mr. Morris, commits such cowardly acts as kidnaping a 61 year old lady at knife point, kidnaping a 15 year old girl for purposes of rape. (RT 5288.)

Again, for the reasons set forth above, this "impact evidence" claim does not rest upon a cognizable constitutional basis. Assuming that the comment, "What about the anguish and the emotional scars that the victim of that crime suffered..." constituted improper victim impact argument, this court cannot find that petitioner would not have been found guilty of the death penalty but for this argument. Undoubtedly this victim suffered anguish and emotional scars–the prosecutor was stating the obvious. It is not as if the prosecutor was arguing to the jury facts about the victim's personal characteristics or the impact on her family which had not been previously presented.

Petitioner argues that the prosecutor improperly argued that petitioner's future dangerousness was an aggravating factor. As discussed above, the Supreme Court has approved the jury's consideration of future dangerousness during the penalty phase. See Jurek v. Texas, 428 U.S. 262, 275 (1976). Therefore, this claim does not state a constitutional violation.

Petitioner argues that the prosecutor improperly argued that he lacked remorse. The prosecutor argued, "I'd like to read you a couple of quotes out of this letter that was introduced at the guilt phase. And I ask you if this sounds like a man that shows the least bit of remorse for his crimes, not only this crime, but his other crimes, which you have heard testimony in regard to." (RT 5287.) The prosecutor then read portions of the letter written by petitioner to Barrett: "'I miss you, and I need to know if you still love me. I know that if I don't hear from you soon, that I'm going to get off on these cops for taking you away from me. Ane you know what I can do.'

Ladies and gentlemen, you do know what Mr. Morris is capable of. Further, 'I've killed once for you and, if I have to, I'll do it again.' Think about that." (RT 5287.)

A prosecutor may argue lack of remorse in California as it is a "universally recognized" factor that may warrant a death sentence. People v. Crittenden, 9 Cal.4th 83, 146, 36 Cal.Rptr.2d 474, 511 (1994). Although in California a prosecutor may not argue that lack of remorse is an aggravating factor, he may argue to the effect that the lack of remorse demonstrates the absence of the mitigating factor of remorse. Id. at 148, 36 Cal.Rptr.2d at 512. Moreover, as common sense alone would indicate, an argument about lack of remorse does not introduce irrelevant factors before the jury. The prosecutor's argument herein did not violate any of the standards set forth in Crittenden. As observed by the California Supreme Court,

> The defense psychiatrist testified that defendant showed remorse. The prosecutor responded by pointing to defendant's letter to Barrett in which he stated that he had killed for her and would do so again. His comment was simply a response based on evidence in the record.

Morris, 53 Cal.3d at 222, 279 Cal.Rptr. at 762.

Because this argument was not improper under California law, this claim should be dismissed.

Petitioner argues that the prosecutor asked the jury to consider irrelevant information, i.e., that the financial cost of life without parole would be high. The prosecutor argued: "All of which agreed that Mr. Morris would do fine in prison, in a citizen supported California institution." (RT 5284.) "...at what point in time does society's obligation to expend time and vast amounts of resources on an individual end, and those resources are better spent on persons that have a chance of being non-violent members of this society." (RT 5288.)

Appealing to the pecuniary interests of jurors during closing argument in the penalty phase of a capital case is clearly improper. Antwine v. Delo, 54 F.3d 1357, 1363-1364 (8th Cir. 1995). In Antwine, the Eighth Circuit found that the prosecutor's argument regarding the cost of life imprisonment versus the death penalty violated the Fourteenth Amendment because the prosecutor's argument contained a number of other irrelevant and unsupported statements that could undermine the jury's sense of responsibility. Id. at 1364. In particular, the

prosecutor had also (improperly) argued that the petitioner would suffer an instantaneous death in the gas chamber, i.e. the death would be quick and easy. Id. at 1362.

In contrast, in Blair v. Armentrout, 916 F.2d 1310 (8th Cir. 1990), the Eighth Circuit found that the prosecutor's argument regarding the cost of life imprisonment did not violate the Constitution. The Eighth Circuit observed that the prosecutor's improper comments regarding the cost of life imprisonment were not the strongest part of the prosecutor's argument. Blair, 916 F.2d at 1324. Instead, the prosecutor "delivered a tough, hard-hitting argument which was based on the hard facts of the case." Id.

In the instant case, the prosecutor's comments regarding the cost of life imprisonment were isolated. This was not the focus of the argument. The prosecutor's argument contained no other serious misrepresentations which, combined with the improper argument, would have undermined the jury's sense of responsibility. A reasonable juror would not have been swayed by this brief reference. Under these circumstances, the court cannot find that petitioner would have been found not guilty of the death penalty but for this argument. The court also specifically finds for the reasons given above that this error would have been harmless under the Brecht, 507 U.S. 617, 631, 113 S.Ct. 1710, 1718 (1993) "substantial and injurious" effect to the verdict standard.

In paragraph F, petitioner asserts that the prosecutor's argument, alone and in combination with erroneous jury instructions, violated petitioner's right to a fair and impartial jury, not to be compelled to testify in his own behalf, to confront and cross-examine witnesses, to a reliable penalty decision, to a penalty decision which is not arbitrary and capricious, to equal protection and to due process of law. In paragraph G he argues that his counsel was ineffective for not objecting to the matters discussed above.

As discussed above, the prosecutor's comment regarding the financial burden of life imprisonment is the only improper argument petitioner challenges. The other instances of alleged improper argument did not constitute constitutional (or state law) violations. Under these circumstances, the court cannot find that the prosecutor's closing argument, as a whole, was so flawed that but for the misconduct petitioner would have been found actually innocent of the death penalty. For that reason, petitioner's claims in paragraphs D, F and G should be

dismissed on procedural default. However, having so ruled, the court can also easily incorporate its findings and holdings herein into an alternative ruling on the merits. *There was no error discussed with respect to claims procedurally barred which would warrant a vacating of the penalty phase verdict even in the absence of procedural default.*

C. Claims XXX, XXXII, XXXIII, XXXIV, XXXV: Jury Instruction Error

1. Claim XXX: Factors in Aggravation Artificially Inflated by Instructions

Petitioner argues that the jury was improperly permitted to consider as separate factors in aggravation the underlying guilt phase convictions and robbery special circumstance, which were prosecuted as part of an indivisible criminal transaction. Petitioner also complains that the jury was improperly permitted to consider the transactionally related prior convictions for both assault with intent to commit rape and the lesser included offense of attempted rape as separate factors in aggravation.

Petitioner argues that the stacking of the guilt phase convictions, special circumstances and prior convictions resulted in an automatic and artificial cumulation of aggravating circumstances which had the probable effect of encouraging the jury to consider petitioner more deserving of the death penalty. Petitioner also complains that the trial judge improperly rejected his special instruction no. 48 which ensured against the artificial inflation of aggravating factors.

Petitioner's argument that the jury should not be permitted to consider their verdicts in the guilt phase (both guilt and special circumstances) has been soundly rejected by the Supreme Court.

> Petitioner's challenge to factor (a) is at some odds with settled principles, for our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. See, e.g., Woodson, 428 U.S., at 304, 96 S.Ct., at 2991 ("consideration of...the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.") We would be hard

> pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

Tuilaepa v. California, 114 S.Ct. at 2637.

Moreover, telling the jury that they should consider the circumstances of the crime and/or special circumstances that they have found true does not preweight the jury's penalty phase determination in favor of guilt. Jurors are not stupid. They are well equipped to understand that the special circumstances and essential underlying circumstances of the crime are basically identical, and these elements of the crime/special circumstances will not be double counted. Where there are additional circumstances of the crime not necessarily reflected in the special circumstance per se, e.g., especially brutal method of carrying out a felony murder, this additional factor is also a common sense factor that should be included or "stacked" in the jury's analysis. Petitioner also fails to note that the factors listed in Cal. Penal Code §190.3 (a) are not described as aggravating or mitigating, thereby necessarily leading to the conclusion that they do not "stack" factors against a defendant. There may be circumstances of the crime that are mitigating, and the jury is welcome to consider those circumstances as well.

The fact that petitioner had a serious criminal record, and that he clearly did not learn, or care to learn, from conviction on his previous misdeeds, is a factor in aggravation that is also universally recognized as an aggravating factor. No reasonable argument can be made that prior convictions are irrelevant in the penalty phase. If petitioner believes that his prior record "stacks" the penalty phase against him, he has himself to blame– not the system that judges his conduct. Petitioner's absurd assertion here is that the petitioner cannot be made to look too bad to the jury regardless of the truth of his misdeeds-- that a "fair system" must drop out aggravating factors once those factors make it appear that they may be "stacking up" against petitioner and that petitioner may be deserving of the

death penalty.

Accordingly, this claim should be denied.[44]

2. Claim XXXI: California Statute Overly Broad and Vague

In a claim very similar the one just preceding, petitioner argues that the jury was instructed to consider factors in aggravation which were constitutionally overbroad and void for vagueness. In particular, petitioner argues that the California statute, and the instructions his jury received about consideration of aggravating evidence, were constitutionally overbroad and vague in violation of Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992) and Bacigalupo v. California, 506 U.S. 802, 113 S.Ct. 32 (1992), because factors (a), (b) and (c) all duplicated findings made at the guilt phase. This claim was also considered and rejected by the district court in Turner v. Calderon, 970 F.Supp. 781, 795 (E.D.Cal. 1997):

> Turner argues that the lack of an appropriate clarifying instruction permitted the jury to arbitrarily

---

44. The California Supreme Court addressed this claim as follows:

> [T]o the extent the defendant implies he was improperly convicted in the first instance of multiple offenses arising from a single incident (§ 654; People v. Cole (1982) 31 Cal.3d 568, 582 [183 Cal.Rptr. 350, 645 P.2d 1182]), we need not reach the merits of his argument. There was no prejudice to him in the introduction of those convictions at the penalty phase here. Because the underlying facts of the convictions at issue were presented in the penalty phase, the jury was aware that the two convictions stemmed from a single incident. Nothing in the prosecutor's argument or elsewhere in the record suggests that the jury weighed the mere number of convictions as distinguished from the facts of the underlying incidents, improperly or inordinately. Indeed, the prosecutor expressly stated in final argument that he was relying on two prior convictions, referring to the separate kidnap and rape incidents. He did not attempt to enumerate defendant's convictions. Any error in introduction of the convictions was harmless.

Morris, 53 Cal.3d at 223, 279 Cal.Rptr. at 763.

and capriciously triple count the underlying murder of Ray Savage in determining penalty, first as felony murder, second as a statutory special circumstance under 190.2 making him death penalty eligible, and third, as a factor in aggravation. He contends that under Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the use of a vague aggravating factor in the weighing process invalidates the sentence unless the error was harmless. Turner's reliance on Stringer is misplaced. In that case, the Court considered an invalid aggravating factor used to determine death eligibility under Mississippi law. Id. at 232, 112 S.Ct. at 1137-38. Sentence selection factors considered at the penalty phase of a California capital trial are not subject to the harmless error analysis announced in Stringer, since death eligibility has already been determined. Bacigalupo, 6 Cal.4th at 465-68, 24 Cal.Rptr.2d 808, 862 P.2d 808; Tuilaepa, 512 U.S. at 975, 114 S.Ct. at 2636-37. The Stringer test applies to those states, like Mississippi, which determine death eligibility and sentence selection during the penalty phase. [Footnote omitted.]

Aside from the inapplicability of Stringer, nothing in either the instructions given or the trial attorneys' arguments to the jury urged or even suggested that the jury should give a single incident duplicative consideration. See People v. Montiel, 5 Cal.4th 877, 938-39, 21 Cal.Rptr.2d 705, 855 P.2d 1277 (1993). In Montiel, the penalty jury was instructed under factor (a) (the circumstances of the crime), factor (b)(the presence or absence of violent criminal activity by the defendant), and factor (c)(the presence or absence of any prior felony conviction). Id. At 938, 21 Cal.Rptr.2d 705, 855 P.2d 1277. The court's holding explains that factors (a), (b) and (c), taken together, allow the jury to consider all the offenses of which defendant was convicted in the current proceeding; [footnote omitted] all his other criminal violence, and all his felony convictions entered before the capital crime was committed. Yet nothing in the statute or parallel instructions implies that any

of this matter may be considered more than once. Hence, even if one or more jurors mistakenly consider a particular criminal incident under the wrong factor, there is little risk that a reasonable jury will give a single incident duplicative consideration. Id. At 938-39, 21 Cal.Rptr.2d 705, 855 P.2d 1277 (citation omitted); see also People v. Sanchez, 12 Cal.4th 1, 79, 47 Cal.Rptr.2d 843, 906 P.2d 1129 (1995).

The issue of "double counting" with respect to factors (a), (b) and (c) also was considered by the Ninth Circuit in Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995). Bonin characterizes the factor (a) instruction as one which "obviously refers to the crimes for which the defendant has been convicted" and the factor (b) instruction as one "intended to refer to crimes for which the defendant has not been convicted." Id. At 848. Like Turner, the petitioner in Bonin argued the penalty instructions permitted the juries [footnote omitted] to double count aggravating factors. Bonin holds that the petitioner's double counting argument is "foreclosed by the Supreme Court's recent holding that the version of factor (b) at issue here is not unconstitutionally vague." Id. citing Tuilaepa, 512 U.S. at 976-77, 114 S.Ct. at 2637-38.

Although Tuilaepa did not specifically address the factor (c) instruction, the same reasoning applied there regarding factor (b) forecloses Turner's challenge here. Like factor (b), which requires the penalty jury to consider the defendant's prior violent criminal activity, factor (c), which directs the jury to consider the defendant's prior felony convictions, "is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact." Id. At 976, 114 S.Ct. at 2637. In this case, the factor (c) instruction appropriately directed the jury's penalty determination. It is not unconstitutionally vague.
This court adopts the reasoning of the Turner court with

respect to petitioner's argument that the instructions were vague and overbroad in violation of Stringer. Petitioner also argues that his special instruction # 48 would have cured the constitutional deficiencies alleged above. Because the court finds that the instructions were not unconstitutionally vague and overbroad, the failure to give petitioner's special instruction # 48 was not error. See United States v. Riplinsky, 109 F.3d 1436, 1440 (9th Cir. 1997) amended in inconsequential part, 129 F.3d 518 (9th Cir. 1997); United States v. Goland, 959 F.2d 1449, 1454 (9th Cir. 1992) (both cases standing for the proposition that a defendant is not entitled to the precise wording of his choice in jury instructions if the instructions given fairly cover the issue on which instruction is given).

For the reasons discussed above, the court recommends that this claim be denied.

3. Claim XXXII: Trial Judge Failed to Instruct that the Jury Could Consider in Mitigation Sentences Given to Co-defendants

The trial judge rejected special instruction no. 51 which provided,

> In determining the existence of mitigating circumstances, you must take into account that the defendant's accomplice, Allison Eckstrom, was allowed to plead guilty to a reduced charge. Avette Barrett was promised three years or less. (RT 5265.)

The trial judge did not state his reason for rejecting this special instruction. (RT 5265.)[45/]

The Supreme Court has acknowledged that such evidence can be mitigating. Dyer v. Calderon, 122 F.3d 720, 742 (9th Cir. 1997)(rehearing en banc granted October 9, 1997), citing Parker v. Dugger, 498 U.S. 308, 315, 111 S.Ct. 731, 736 (1991). "However, it does not follow that such evidence is relevant mitigating evidence in all cases. Nor does it follow that [petitioner] had a constitutional right to have the jury hear such evidence. Rather, a state court is free to exclude as irrelevant 'evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'" Id. (quoting

---

45. The court notes however the mandatory "must" language of this instruction dealing with mitigating factors at the penalty phase.

Lockett v. Ohio, *438 U.S. 586, 604 n. 12 (1978)*(plurality)). Evidence of Barrett's and Eckstrom's sentences does not relate to petitioner's background or to the circumstances of the murder. Id. The "'Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.'" Id., quoting Romano, 114 S.Ct. at 2011.

Although Dyer involved the introduction of evidence concerning the sentence of a co-defendant, the principle is identical with respect to the giving of a jury instruction. Accordingly, the court recommends that this claim be denied.

Moreover, and in the alternative, counsel *was* permitted to argue the sentences of petitioner's accomplices, and characterize such as a mitigating factor under the general guidelines given to the jury concerning mitigating factors. This is not a case where an essential instruction was missing from jury consideration; rather, petitioner believes that he is entitled to craft pinpoint instructions regarding his theory of mitigation. Petitioner is not entitled to pinpoint instructions on his arguments when the jury instructions given adequately comprehend the theory. United States v. Vandenburgh, 473 F.2d 1313, 1314 (9th Cir. 1973). Here § 190.3 (j) instructs the jury that they may compare the defendant's role in the crime with others involved, and if relatively minor, such may be a mitigating factor. This was petitioner's theory, and he was entitled to argue that his role was minor in comparison with his accomplices who received much lesser penalties. Of course, the jury was entitled to reject this theory.

4. Claim XXXIII: Trial Judge Refused to Modify CALJIC 8.84.1

Petitioner argues that the jury was given an instruction which unconstitutionally limited its consideration of mitigating evidence presented on petitioner's behalf. Petitioner alleges that he requested that the trial court modify CALJIC 8.84.1 to delete the "extreme" mental disturbance in Factor D and "extreme" duress or "substantial" domination in Factor G. (CT 2458, 2468-71; CT 2487-2488.)

The identical claim, with respect to Factor D, was raised in Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992). In Hendricks, the court first observed that the language regarding "extreme mental or emotional disturbance" comes

directly from California's death penalty scheme. The Ninth Circuit rejected petitioner's claim citing Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078 (1990). In Blystone, the trial judge had instructed the jury that it could consider as a mitigating factor, evidence of an "extreme" mental or emotional disturbance, but also instructed the jury that it was entitled to consider "any other mitigating matter." Blystone, 494 U.S. at 308, 110 S.Ct. at 1084. The Supreme Court rejected petitioner's argument that the instructions had prevented the jury from considering mental disturbance not rising to the level of "extreme" because the jury had also been read instructions regarding other "mitigating matter."

In Hendricks, the trial judge gave two instructions functionally identical to the ones at issue in Blystone. The Ninth Circuit rejected petitioner's attempt to distinguish Blystone by pointing to the prosecutor's emphasis on the "extreme" language. The Ninth Circuit found that such emphasis only clarified that particular mitigating circumstance; it did not imply that the jurors were barred from considering other relevant mitigating factors including mental or emotional disturbance below an "extreme" level. Hendricks, 974 F.2d at 1109.

In the instant case, the jury was instructed with factor K and the trial court's supplement which provided that it could consider, "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime *and any sympathetic or other aspects of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he's on trial.*" (RT 5334, emphasis added.) In light of this instruction, petitioner's argument regarding factor D must fail.

Although Hendricks did not address factor G ("extreme" duress or "substantial" domination), the court finds that the reasoning for rejecting the challenge to Factor D is equally applicable to petitioner's challenge to factor G. Accordingly, this claim should be denied.

5. Claim XXXIV: Trial Judge Failed to Delete Unnecessary Factors from Jury Consideration

Petitioner argues that the trial court instructed the jury to "consider, take into account, and be guided by" at least five

mitigating factors (which he does not identify) that were irrelevant to any evidence admitted at trial. Petitioner also argues that the trial judge failed to designate which factors were aggravating and which were mitigating. Petitioner further argues that the instructions, as worded, may have led the jury to believe that the absence of evidence of any factor established factors in aggravation.

Petitioner's claim that the trial court failed to delete inapplicable mitigating factors was rejected in Odle v. Calderon, 884 F.Supp. 1404, 1428-29 (N.D.Cal. 1995). There, the court stated,

> The Supreme Court recently rejected a similar challenge to California's statutory sentencing factors. See Tuilaepa v. California, ___ U.S. ___, ___ _ ___, 114 S.Ct. 2630, 2637-38, 129 L.Ed.2d 750 (1994). The Court explained that, under the state's death penalty scheme, the jury narrows the class of death eligible defendants at the guilt phase, when it convicts a defendant of first degree murder and one or more statutory special circumstances. Id. at ___ _ ___, 114 S.Ct. at 2636-37. Once this constitutionally required narrowing has been done, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." Id. at ___, 114 S.Ct. at 2638. The jury may appropriately be pointed toward a variety of factors to consider in its sentencing decision, or it may be given "'unbridled discretion.'" Id. at ___, 114 S.Ct. at 2639 (quoting Zant v. Stephens, 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-42, 77 L.Ed.2d 235 (1983)).

Relying on Tuilaepa, the Northern District Court held that the trial court did not commit constitutional error by instructing the jury on all of California's statutory factors. This court agrees. Petitioner is not entitled to habeas relief with respect to his claim that the jury was instructed to consider five irrelevant mitigating factors.

Petitioner's claim that the trial court failed to tell the jury which factors were mitigating and which were aggravating was also rejected in Odle:

> Under California's death-penalty scheme, the jury instructions need not define which enumerated sentencing factors are aggravating and which are mitigating. See Harris v. Pulley, 692 F.2d 1189,

> 1194 (9th Cir. 1982) rev'd on other grounds 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)(upholding constitutionality of California death-penalty statute); see also Tuilaepa, ___ U.S. at ___, 114 S.Ct. at 2638-39.

Odle v. Calderon, 884 F.Supp. at 1429.

This court adopts the Odle holding and recommends that this particular claim be denied.

Petitioner next claims that the instructions improperly led the jury to believe that the absence of any factor established factors in aggravation. In Bonin v. Calderon, 59 F.3d 815, 848, the Ninth Circuit stated,

> In accordance with California Jury Instructions, Criminal (CALJIC) No. 8.8.42, the trial courts in both cases listed the statutory mitigating circumstances and instructed the jury to consider the listed factors that were applicable. Bonin v. Vasquez, 807 F.Supp. At 619; Bonin v. Vasquez, 794 F.Supp. At 979. Bonin argues that this allowed the juries to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances. Bonin argues that this allowed the juries to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances.
>
> We recently rejected a virtually identical argument. Williams, 52 F.3d at 1481. Both courts instructed the juries to consider the listed factors only "if applicable." The cautionary words 'if applicable' warned the jury that not all factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor.

In the instant case, the trial court instructed the jury to consider those factors *if applicable* as either aggravating or mitigating circumstances. (RT 5337.) In accordance with Bonin, this claim should be denied.

6. Claim XXXV: Failure to Instruct on Petitioner's Decision Not to Testify

Petitioner argues that the trial court's failure to instruct on his decision not to testify at the penalty phase violated his Fifth,

Sixth, Eighth and Fourteenth Amendment rights. Petitioner argues that he was substantially prejudiced by the failure to give this instruction, particularly in light of the prosecutor's closing argument which commented on his failure to express remorse. Petitioner cites page 5287 of the Reporter's Transcript in support of this claim. At this page, the prosecutor argues,

> There was some discussion by Dr. Globus that, in his opinion, Mr. Morris did show some remorse. I'd like to read you a couple of quotes out of this letter that was introduced at the guilt phase. And I ask you if this sounds like a man that shows the least bit of remorse for his crimes, not only this crime, but his other crimes, which you have heard testimony in regards to.

This court has previously found that the prosecutor's rebuttal to Dr. Globus did not infringe petitioner's Fifth Amendment rights, and this assertion has no bearing on the issue raised by this claim.

In Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112 (1981), the Supreme Court held that a defendant in a state criminal trial has the right, upon request, to a jury instruction that his failure to testify may not be the basis of an inference of guilt and should not prejudice him in any way. In James v. Kentucky, 466 U.S. 341, 350 (1984), the Supreme Court reiterated that "[t]he Constitution obliges the trial judge to tell the jury...not to draw the inference if the defendant so requests[.]" Failure to give the instruction is subject to harmless error analysis. See e.g., Hunter v. Clark, 934 F.2d 856, 860-61 (7th Cir.)(en banc); Finney v. Rothgerber, 751 F.2d 858, 864 (6th Cir.); Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984).

In the instant case, petitioner cites to no place in the record where his counsel requested such an instruction. Instead, petitioner argues that the court had an "independent obligation" to give the instruction. This is not the law. Middleton v. Evatt, 855 F.Supp. 837, 848-849 (D.S.C. 1994), *aff'd* 77 F.3d 469 (4th Cir. 1996); see also Watters v. Hubbard, 725 F.2d 381, 385-386 (6th Cir. 1984). Therefore, because the instruction was not requested, it was not error to fail to give it.

D. Claims XXXVI and XL: Trial Judge Committed Error When He Caused Jury to

Reveal its Numerical Division and Gave Incorrect Response

In Claim XXXVI petitioner argues that his death sentence was unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments when 1) the trial court gave the jury an instruction with constitutionally erroneous language; 2) the trial court forced revelation of the numerical split between the jurors; 3) the trial court fundamentally misled jurors about their sentencing decision by failing to properly respond to a jury inquiry. In claim XL petitioner essentially realleges that the trial court misled jurors about their sentencing decision by failing to properly respond to a jury inquiry. The court previously issued separate Findings and Recommendations on these two claims recommending a grant of the writ insofar as these two claims encompassed erroneous language in the instruction and failure to appropriately respond to the jury's query about a jury instruction. The court did not adjudicate petitioner's claim regarding revelation of the numerical split of the jury. The latter claim is the only one that will be dealt with in these Findings.[46/47]

---

46. Recently, the undersigned received a letter from petitioner himself, and not his counsel, questioning the granting of the writ on Claims XXXVI and XV on "technical grounds." Despite his sworn averments to the contrary in the amended petition, petitioner now believes that the jury was not confused by the "typographical error" in the jury instructions relating to the two penalties that the jury could decide. He would rather prevail on more substantive grounds. However, it is this court's practice to ignore unsolicited comments on the merits of a claim from represented parties who decide to address the court outside of their counsel. The court sees no reason to depart from this practice in a capital case.

47. Within Claim XXXVI, petitioners makes a cryptic reference to error in connection with the trial judge's refusal to tell the jury what would happen in the event they were deadocked. This assertion is not presented as a claim, and the court is unsure of why petitioner references this episode at all, unless for background purposes. In any event, the court finds no merit to the assertion.

In U.S. v. Jones, 132 F.3d 232 (5th Cir. 1998) a defendant sentenced to the death penalty in federal court argued the failure to instruct the jury of the consequences of not reaching a unanimous verdict resulted in a violation of the Eighth Amendment.

It is constitutionally permissible for a state trial judge to inquire into the numerical division of the jury, so long as the context of the inquiry does not suggest that the jurors were coerced into changing their views. See Locks v. Sumner, 703 F.2d 403, 406-07 (9th Cir. 1983); Jimenez, 40 F.3d 976, 981 (9th Cir. 1994). In the instant case, the court discussed the matter with the jury as follows:

> Court: Mr. Lewis, the Court has been in receipt of your question, or questions. And before I respond to the questions, I have discussed them with counsel as well. Without telling me exactly how the jury stands one way or the other, can you give me some idea or give us an idea about the numerical count, how might it stand? Seven/five, six/six, four/eight?
>
> Juror Lewis: Approximately ten to two, Your Honor.
>
> Court: Do you feel as though if I allow you to continue to deliberate, you might be able to reach a decision in the matter?
>
> Juror Lewis: I think there's a possibility, your Honor.
>
> Court: I'm going to let you do that. The statutes

> Although the use of instructions to inform the jury of the consequences of a hung jury have been affirmed, federal courts have never been affirmatively required to give such instructions. See Allen v. United States, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157-58, 41 L.Ed. 528 (1896)(upholding the use of supplemental instructions to inform the jury of the effect of a hung jury); United States v. Sutherland, 463 F.2d 641, 648 (5th Cir. 1972)(allowing use of Allen charge). Consequently, we hold that no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict.

Jones, 132 F.3d at 245. See also Evans v. Chandler, 881 F.2d 117, 123-124 (4th Cir. 1989). Finally, California law does not require such an instruction. People v. Rich, 45 Cal. 3d 1036, 1115, 248 Cal. Rptr. 510, 560 (1988).

In accordance with case law this court finds that petitioner had no constitutional right to an instruction informing the jury of the consequences of its failure to reach a verdict.

provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question. I am unable to tell you. The answer to your second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision. I suggest that you take as long as you might want to take. Don't rush. Please do not rush, all right? (RT 5347-5348.)[48]

This court cannot find that the comments by the trial court regarding the numerical division in any way coerced the jury. "By simply making the inquiry, the trial judge placed no pressure on the jury to reach a verdict and expressed no views as to the significance, if any, of its division. Thereafter, jury deliberation continued for some four additional hours over two days before the penalty verdict was reached." Morris, 53 Cal.3d at 227, 279 Cal.Rptr. at 765. The trial court emphasized to the jury that it should not rush its deliberations.

Because there is no evidence indicating the jury was coerced by the trial court's inquiry into its numerical division, this claim should be denied.

E. Claims XXXVII and XXXVIII: Ineffective Assistance of Trial and Appellate Counsel and Petitioner's Incompetence to Assist Trial Counsel

In claim XXXVIII, petitioner alleges that he was not competent to assist trial counsel. In Claim XXXVII, petitioner alleges ineffective assistance of trial and appellate counsel. This claim involves a pot pourri of assertions that counsel failed to perform a myriad of tasks that would have made a difference in the outcome of trial– both guilt and penalty phase. Both claims XXXVII and XXXVIII were found to be procedurally defaulted. However, those portions of these claims involving

---

48. The trial court's admonition "not to rush" and "take as long as you might want to take" distinguishes this case from Jimenez and strongly implies that no juror should be in a rush to change his or her mind. In any event, the "defacto Allen charge" holding of Jimenez would probably constitute a new rule under Teague.

the penalty phase were found defaulted pending a final determination of the miscarriage of justice exception to the procedural default doctrine. The portions of Claim XXXVII involving the penalty phase are set forth in paragraphs B, G, H and M.[49]

In paragraph B, petitioner alleges that counsel unreasonably failed to investigate evidence concerning his background and upbringing and present it at the penalty phase. In paragraph G, petitioner alleges that his counsel failed to investigate and present evidence regarding his mental state at the penalty phase despite receiving early and repeated indications of petitioner's history of organic brain damage, losses of consciousness and familial history. In paragraph H, petitioner alleges that counsel failed to investigate his competency to stand trial and to assist in his defense. In paragraph M, petitioner alleges that counsel failed to present

---

49. The guilt phase ineffective assistance claims assert, without any factual showing whatsoever, either in the petition or on evidence outside the petition, that counsel failed to challenge for cause jurors whose bias was "unquestionably shown" (no reference to any specific juror); that counsel failed to investigate the background of petitioner's accomplices to ascertain that they were "skilled manipulators, that counsel failed to ascertain that the jailhouse informants discussed amongst themselves possible benefits they would receive for testifying, that counsel failed to investigate the background of the victim (Van Zandt) to ascertain that such a background could be compatible with the belated defense assertion that Van Zandt raped one of the accomplices, and petitioner exacted his righteous revenge on Van Zandt for this misdeed, or in the alternative, that petitioner's accomplices put him up to the robbery/murder. Not only does petitioner forget in making these claims that he confessed to the murder, he does not even attempt to be consistent with his various theories at this stage. Further, petitioner has totally failed in his burden to put before the court colorable allegations that would warrant an evidentiary hearing had not petitioner defaulted on his claims. There is no doubt that had petitioner not defaulted, the claims would have been denied for failure to oppose respondent's summary judgment motion in any legitimate fashion. The guilt phase ineffective assistance claims in this case, in combination with no factual presentation to oppose summary judgment, exemplify poor pleading practice in federal capital habeas proceedings that coverup and frustrate adjudication of legitimate issues. Petitioner makes belated, speculative, baseless, and at times inconsistent, assertions and expects the federal court to spend years in discovery and adjudicating every one of the assertions.

available mental state and other mitigation evidence at the penalty phase.

Petitioner's argument in support of the incompetency and penalty phase assertions in XXXVII and XXXVIII is paradoxically based primarily on the evidence presented at the penalty phase. Accordingly, the court will first summarize the relevant penalty phase evidence.

Penalty Phase Mental Evidence

Petitioner's mother, Lucille Morris, testified that she had trouble while she was pregnant with petitioner. (RT 4997.) In particular, she almost miscarried with him when she was six months pregnant. (RT 4997.) She had hoped that petitioner would be a girl. (RT 4997.) She testified that as a child, petitioner was hyperactive. (RT 4998.) When he was four years old, she sought psychiatric help for him. (RT 4998.) When he was in kindergarten, his teacher choked him. (RT 5000.) As a child, he often ran away. (RT 5000.) She disciplined petitioner by spanking him and putting him in a corner. (RT 5001.) She testified that petitioner's father whipped him with a belt and hit him in the head with his knuckles. (RT 5006.)

Petitioner's older brother, Eddie Morris, testified that when petitioner was a child it was easy for him (Eddie) to get petitioner to do things. (RT 5008.) Petitioner's younger brother, Brent, testified that as a child petitioner was more of a follower than a leader. (RT 5012-5013.) Petitioner did a lot to get attention. (RT 5013.) Petitioner's father, Richard Morris, testified that petitioner's mother favored her oldest and youngest children. (RT 5025.) He testified that petitioner was physically abused by his kindergarten teacher. (RT 5026.)

Jacqueline Carroll, a clinical psychologist, testified that she examined petitioner on three occasions. (RT 5091.) She testified that petitioner came from a family where there was considerable verbal and physical abuse and a lot of tension. (RT 5092.) Petitioner was described to her by his family as being hyperactive and having problems with impulsiveness. (RT 5092.) Petitioner also had learning disabilities. (RT 5093.)

She performed a series of psychological tests on petitioner including a Wechsler Adult Intelligence Scale, Rorschach ink blots, Thematic Apperception Test, Projective Drawings, the

Minnesota Multiphasic Personality Inventory, and the Luria Neuropsychological battery. (RT 5094-95.) The result of the Wechsler Adult Intelligence test indicated that petitioner was above average intellectually in some areas and well below average in others. (RT 5095.) The areas that were impaired involved general information and the ability to focus attention. (RT 5095.) The results of the Rorschach ink blot test indicated that in some ways petitioner did not look unusual, but in other ways he seemed to have areas where he did not see reality the same way as most people. (RT 5096.)

Dr. Carroll concluded from her tests that petitioner had a disturbance of those functions that are primarily in the frontal lobe and temporal lobes of the brain–the area that help individuals make decisions, to plan things out, to see the consequences of actions. (RT 5098.) She classified the brain damage petitioner had in these areas as being mild to moderate. (RT 5098.) She also opined that petitioner's brain disturbance went back to his childhood. (RT 5099.) The brain disturbance was apparent even when he was a youngster by the descriptions of his behavior as a young child and the fact that he responded positively to treatment with Ritalin when he was four or five. (RT 5099.) She also testified that petitioner had an impaired ability to concentrate and was easily distracted by things outside himself. (RT 5099.) He also had very little ego strength. (RT 5099.) He was easily influenced by his feelings and was impulsive. (RT 5099.)

Dr. Carroll also testified that petitioner had a significant borderline personality disorder. (RT 5100.) At the time petitioner committed the offense, he knew the difference between right and wrong, but his capacity to conform his conduct was impaired because of his brain dysfunctioning. (RT 5101.) She testified that petitioner was not psychopathic. (RT 5107.)

Dr. Globus testified that he diagnosed petitioner as suffering from adjustment disorder with depressed mood and amphetamine or similarly acting sympathomimetic drug abuse in remission. (RT 5171.) In terms of Axis II, he diagnosed petitioner as suffering from a borderline personality disorder with dependent and antisocial features and an atypical organic brain syndrome combined with attention deficit disorder, residual type. (RT 5172.) Petitioner's primary problem was the attention deficit disorder. (RT 5172.)

Dr. Albert Globus testified that he ordered a computerized

electroencelphalogram (EEG) performed on petitioner. (RT 5137.) The results of this EEG indicated that there were diffuse abnormalities in petitioner's brain. (RT 5138.) The test showed that petitioner's visual processing fell within the normal range. (RT 5145.) His verbal processing, i.e. capacity to deal with an auditory input, was not within the normal range. (RT 5146.)

In reaching his conclusions regarding petitioner, Dr. Globus relied on a report by Dr. Swanson, a psychiatrist. (RT 5148.) This report was prepared around the time that petitioner was nine or ten. (RT 5149.) Dr. Swanson diagnosed petitioner as suffering from attention deficit disorder. (RT 5149.) Dr. Globus testified that petitioner suffered from this disorder as an adult. (RT 5150.) It caused petitioner to have trouble organizing his thoughts and figuring out the consequences of his behavior. (RT 5150.) Dr. Globus testified regarding the part of Dr. Swanson's report addressing the influence of petitioner's family on his condition. There was a possibility that petitioner received encouragement from his father for aggressive action. (RT 5152.) After petitioner's father was arrested for an offense, petitioner's problems exacerbated. (RT 5152.)

Dr. Swanson prescribed a course of treatment for petitioner which included treatment for petitioner's parents, further psychological testing for petitioner, and continuation of petitioner's medication. (RT 5154.) At that time, petitioner had taken Ritalin and Phenobarbitol. (RT 5154.) That the Ritalin helped petitioner confirmed his brain dysfunction–attention deficit disorder. (RT 5155.) This condition may have first occurred in utero because petitioner's mother had problems during her pregnancy. (RT 5155.) It clearly began when petitioner was three because this was when his parents first reported problems. (RT 5155.)

Dr. Globus testified that a very high percentage of people with this disorder (ADD) end up being involved in delinquent behavior. (RT 5159.) The treatment for this condition was expensive, although some public funds were available. (RT 5164.) At some time when his father was unemployed, Short Doyle funds were available. (RT 5164.) There was a plan to treat petitioner under these funds, but his father got a job so he no longer qualified. (RT 5164.)

Dr. Globus also testified that there were antisocial features to petitioner's personality. (RT 5169.) In addition, petitioner

had used drugs, his preference being stimulants including speed and methamphetamine. (RT 5177.) It had the same effect as Ritalin. (RT 5177.) Dr. Globus thought that petitioner may have been self-medicating himself. (RT 5178.)

Competency

In this claim, petitioner alleges that he was incompetent, that his counsel were ineffective for not having moved to find him incompetent, and that the trial court erred in not sua sponte holding a competency hearing.

Before discussing this assertion in terms of whether a miscarriage of justice would result from not reviewing this defaulted claim, the court notes that petitioner is estopped from making the claim in the first instance. Under oath, in the very document in which petitioner brings his assertions that he was unable to assist his counsel, petitioner has also asserted in connection with his Claim XII that he was prejudiced by being absent from a jury instruction conference: "Petitioner was actively involved in assisting his attorneys at trial." Amended Petition at 35. It cannot be both ways– petitioner cannot both be "actively involved" in assisting his attorneys and totally unable to assist his attorneys. The hot and cold competency allegations demonstrate the factual bankruptcy of this claim. The competency allegations fail on these grounds alone whether in the context of assessing a miscarriage of justice, or if viewed on their merits. Nevertheless, for the sake of completeness, the court will undertake further review.

The general definitional criteria for competence to stand trial is well established: "the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 2685 (1993). The methodology for reviewing the issue of the *trial court's* "failure" to recognize incompetence per se is quite different than the issue of ineffective assistance of counsel for failure to raise a competency issue. The former claim involves a review of the record, for the most part, and the latter can involve quite a bit of extra-record evidence.

The Ninth Circuit case of Darrow v. Gunn, 594 F.2d 767 (9th Cir. 1979), citing the seminal Supreme Court cases of Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966); Dusky v.

United States, 362 U.S. 402, 80 S.Ct. 788 (1960); and Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975), succinctly sets forth the test that is applied when petitioner alleges that the trial court erred in not holding a competency hearing and thereafter finding him incompetent to proceed to trial.

> However, this court has stated that: "a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent . . . . 'Substantial evidence' is a term of art. "Evidence" encompasses all information properly before the court . . . . Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency . . . . Once there is such evidence from any source, there is doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court (in such cases) is not to determine the ultimate issue: Is the defendant competent . . . ? It [Sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue." [citing cases]

Darrow, 594 F.2d at 770-771.

Darrow went on to give illustrative situations from the case law concerning what actions give rise to such reasonable doubt of competency--long and extensive [known] history of mental illness and irrational behavior, a psychiatric report giving rise to a competency problem, irrational behavior in the court's presence. In addition, the undersigned has presided at several initial appearances where signs of a defendant's incompetence have presented themselves--blank stares and inability to respond at all to questions, very unkempt and disheveled appearance, inability to interact with counsel in the court's presence, extreme emotional liability. Petitioner has pointed the court to no record or non-record evidence *known at the time* concerning application to petitioner of the factors that Darrow or the undersigned mentioned. Petitioner's lawyer made no representation of incompetency to the judge, no expert or lay witness that appeared in the penalty phase intimated that petitioner was mentally defective to such a degree that he could not generally understand the proceedings or assist his counsel.

Petitioner did not exhibit behavior problems at trial. Thus, there was no reason whatsoever for the trial court to have suspected that petitioner was incompetent.

With respect to ineffective assistance of counsel, present habeas counsel do not supply extra-record evidence, but rather base the incompetency argument on evidence existing in the record presented at the penalty phase (and from which no trial expert deemed petitioner incompetent). In his opposition, petitioner discusses various reports and other evidence regarding his mental state.[50/] Petitioner is apparently arguing that his counsel and the court should have inferred from this evidence that petitioner was not competent, or that such evidence should have encouraged trial counsel to perform further investigation. The court will below summarize the evidence on which petitioner relies.

At pages 50-55 of the opposition, petitioner argues that voluminous records and documentary evidence existed which demonstrate that he suffered from multiple medical and psychiatric conditions which impaired his cognitive functioning even as a young child. Petitioner claims that early hospital and child reports reveal a range of cognitive and social impairments. He claims that his mother suffered a near miscarriage at 6 months; in kindergarten a Stanford-Binet test revealed deficits in visual-motor skills; by first grade petitioner was in special education classes.

Petitioner also argues that in 1966, clinicians recommended that he be sent to Napa State Hospital for psychiatric observation; he was referred to a Short-Doyle Clinic for mental health intervention.

Petitioner goes on to argue that he came to the attention of local authorities after his father was charged and convicted of molestation.[51/] Petitioner quotes his teacher as stating that petitioner had "nervous energy" and a difficult time sitting still. Petitioner quotes from another report prepared when he was a child as stating that his father blamed the start of "everything" on petitioner's experience with a kindergarten teacher who

---

50. None of the reports referred to by petitioner in his opposition are attached as exhibits. In some cases, the source of petitioner's references is not clear.

51. Petitioner's father was apparently convicted of molesting two of petitioner's nieces in their home. Petitioner himself was not molested.

slapped him. The report also states that petitioner was placed on Ritalin. Petitioner quotes another note discussing his trouble in school. Petitioner states that he was referred to a neurologist after a suggestion of cerebral dysfunction. Petitioner then discusses the report of Dr. Swanson.

Petitioner also argues that he suffered seizures and chronic headaches for his entire life. When he was 20 years old he was transferred from the Sacramento County Jail to the U.C. Davis Medical Center for apparent seizures. Petitioner goes on to discuss other medical records concerning his seizure disorder.

In pages 55-56 of the opposition, petitioner argues that his records from the California Department of Corrections (CDC) confirmed the existence of significant impairments of his functioning. He states that medical records maintained by the CDC during his incarceration at Vacaville report a history of seizures. In 1982 and 1983 the CDC records reflected an ongoing gastrointestinal problems and chronic headaches. He was repeatedly described as obese. In 1985 petitioner was admitted to a psychiatric unit. Soon afterward, he reported vertigo and chills.

At page 57 of the opposition, petitioner argues that his disabilities were confirmed by qualified experts during the period of his arrest and trial. Petitioner refers to the 1986 report by Dr. Sidney Kurn, a neurologist. In 1986 he performed an EEG and found that petitioner's brain functions were moderately abnormal. According to petitioner, this was the EEG done at Dr. Globus' request.

Petitioner argues that this history demonstrates that his cognitive functioning was compromised by both organic and psychiatric defects which demonstrated his incompetence. While it is clear that petitioner had mental problems, the record does not suggest that further investigation would have demonstrated that petitioner was incompetent. The testimonies of Dr. Globus and Dr. Carroll indicate that petitioner's primary mental problem was attention deficit disorder. Dr. Globus testified that petitioner's brain damage caused this disorder. While this condition may have been significant, it surely did not render petitioner unable to consult with his lawyers with a reasonable degree of rational understanding. Petitioner has presented no evidence to support such a theory in opposition to respondent's summary judgment motion.

In his opposition, petitioner quotes portions of the penalty phase testimony in support of his claim. However, several of

these quotations are taken out of context. Petitioner quotes Dr. Carroll as testifying that petitioner "didn't see reality the same way most people do." (RT 5096.) Dr. Carroll made this comment in response to a question regarding the results of the Rorschach ink blot test:

> Q: What did you ascertain, if anything, from the results of that test?
>
> A: Well, in terms of the projective test, Bruce, in some ways, didn't look unusual, but in other ways, he seemed to have area where he didn't see reality the same way most people do. (RT 5096.)

Dr. Carroll did not go on to describe what she meant by petitioner not seeing reality the same way most people. The court cannot infer from this comment that Dr. Carroll meant to say that petitioner was, for example, delusional. If Dr. Carroll meant to imply that petitioner was incompetent, petitioner has presented no evidence to support this speculation.

Petitioner next quotes Dr. Globus as testifying that petitioner did not act "rationally or logically." Dr. Globus made this comment in the following discussion:

> And during the mental status examination there were–there was evidence of inability to organize his thoughts and to carry out sort of reasonable, logical plans in–related to his self interest. In other words, he didn't act logically and rationally within the variation one sees in normal human behavior so that I–I felt that the history was strongly suggestive of brain damage of a mild to moderate nature of long duration, perhaps since birth, certainly from his early years.
>
> And the mental status examination, that is, the current examination of his functions in terms of memory and capacity to abstract and use language was such that it was consistent with that history, that is, that he–that he had some brain damage which was interfering with his capacity to deal in the normal fashion, to mature psychologically and socially in a normal fashion. (RT 5135.)

In describing petitioner as not acting logically and rationally, Dr. Globus was describing symptoms of petitioner's attention deficit disorder. If Dr. Globus meant to imply that petitioner was more seriously mentally ill, petitioner has

provided no evidence to support this inference.

Petitioner also argues that he suffered brain damage. While it is arguable that petitioner has suffered some brain damage, Dr. Globus testified that this is what caused the attention deficit disorder. That petitioner suffered brain damage did not automatically make him incompetent. Petitioner also asserts that Dr. Globus did not render a professional opinion regarding his competency. This is precisley the court's point. It is obvious that even this expert would not have thought such an opinion expressible. And, petitioner has not presented a declaration from a mental health expert in support of his opposition to summary judgment addressing the issue of petitioner's incompetence.

Finally, the court observes that petitioner testified at trial. His testimony was coherent and he appears to have understood what was going on. If petitioner's attention deficit disorder affected petitioner to the degree suggested in his opposition, he would not have been unable to testify as he did. Because petitioner has presented no evidence demonstrating that he was incompetent, and because the record does not contain sufficient evidence from which the court can infer incompetence, neither petitioner's counsel nor the trial court were remiss in failing to pursue this issue. For these reasons, this claim should be dismissed on procedural grounds.

The court further finds in the alternative that had this issue of competency not been defaulted, the discussion above would warrant a denial of the claim on its merits.

Ineffective Assistance of Counsel re: Mental Mitigating Evidence

Petitioner presented the following witnesses at penalty phase:

Lucille Morris– mother of petitioner who testified to petitioner's upbringing;

Eddie Morris – older brother who testified to his father's physical discipline and petitioner's character traits including acts of kindness performed by petitioner;

Richard Morris– father of petitioner who testified to several problems encountered by petitioner in his childhood years;

Lawrence Wilson–educator who later worked in various prison systems, including the California Department of Corrections, who ultimately testified that petitioner could program well as a life prisoner;

Byron Eshelman– a prison chaplin with education in clinical

psychology who testified that petitioner had good qualities that would be of benefit to others in prison, and that his present maturity would enable him to program well;
Milton Moeschler– foundational witness;
Jacqueline Carroll– clinical psychologist whose testimony has been discussed at length;
Albert Globus– psychiatrist whose testimony has been discussed at length;
James Park– clinical psychologist with extensive experience in California prison work who testified that petitioner could program well in prison.

In his opposition, petitioner argues that his counsel failed to investigate and present a full and reliable family history and failed to investigate evidence of petitioner's drug usage.

With respect to family history, petitioner argues that "[a]lthough there was testimony regarding both the relevance of family history and its possible impact on petitioner's mental health status assessment, the bulk of that testimony concerned what Dr. Carroll and Dr. Globus described as '...a paucity of information regarding the parents in present family interactions, et cetera, which seem to reflect the parents' tendency to avoid these areas and use denial...' (RT 5151.)" Opposition, pp. 64-65. Petitioner argues, "[t]his minimal information raises the specter of a less-than-ideal childhood without describing the critical details of petitioner's early experience or, more importantly, without providing the jury with a proper context in which to view petitioner's development." Opposition, p. 65.

Petitioner states that his father was convicted of sexual offenses when he was ten years old and that his mother rejected him early on. Petitioner claims that these facts were neither developed nor integrated in to the mental health testimony. Petitioner also faults counsel for not investigating his seizure disorder. Because of this condition, petitioner argues that he suffered memory lapses making him an unreliable reporter of information. Petitioner argues that because of his inadequate memories, he often confessed to things he did not do. This left him prey to his manipulative co-defendants.

As observed by petitioner, an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) - Petitioner's counsel did present evidence regarding petitioner's family history during the penalty phase.

Petitioner's mother testified that his father whipped and hit him, and that he was choked by his kindergarten teacher. She also testified that she had hoped he was a girl. His brother Eddie testified that petitioner was not one of their mother's favored children. Dr. Carroll testified that petitioner came from a family where there was a lot of verbal and physical abuse. Dr. Globus testified that Dr. Swanson's report stated that after petitioner's father was arrested for an offense, petitioner's problems were exacerbated. With respect to his mother's rejection of him, Dr. Globus testified that "[i]f he had some behavior deviances related to cerebral dysfunction, they may have only increased angry and rejecting feelings toward him that in turn could have increased his behavior problems because of an attendant anxiety and low self-esteem." (RT 5152.)

Petitioner now speculates that his counsel should have dug deeper into the issue of his mother's rejection of him and petitioner's reaction to his father's arrest. However, petitioner presents no evidence indicating that there was anything more to the effect of these incidents on him other than what was presented at trial.

In any event, the court cannot find that petitioner would have been found actually innocent of the death penalty if further evidence regarding these matters had been presented. The jury was made aware that petitioner had been abused both physically and emotionally as a child and that his parental upbringing was less than ideal. Additional evidence of these matters would not have swayed this jury.

No evidence regarding petitioner's seizure disorder was offered at the penalty phase. In the opposition, petitioner cites several reports discussing his seizure disorder. First, when he was twenty years old, he was transferred from the Sacramento County Jail to the U.C. Davis Medical Center for treatment for seizures. The intake report stated, "...head trauma and onset of seizures in early 1977." His diagnosis were, "(1) Seizure disorder–? Idiopathic? Post-traumatic; and (2) probable seizure tonight." Petitioner states that later that year he was readmitted, this time with an admitting diagnosis of seizure disorder and a subtherapeutic dilantin level. Later that year, he was admitted after having four seizures over the course of a single week. Dr. Warren reported no family history of epilepsy but petitioner was knocked out in '74 or '75 for unknown period...onset dizzy and then blacks out."

Petitioner states that two subsequent examinations in 1978

confirmed a seizure disorder and emphasized the need for dilantin and phenobarbital in the jail. Petitioner claims that in 1977 and during the years following, he was repeatedly diagnosed with "status epilepticus," "seizure disorder," "possible seizure disorder," and "new onset seizure disorder, status post epileptic." He was treated with dilantin, phenobarbital, oxygen and glucose. Petitioner also claims that his medical records maintained during his incarceration at the California Medial Facility (CMF) report a history of seizures and that he was maintained on high levels of Dilantin.

It appears that petitioner is now concluding that evidence regarding his seizure disorder would have been relevant to explain his tendency to confabulate, caused by seizure induced memory lapses. However, petitioner neither produced evidence at trial, nor here in federal court, which links up the infrequent seizure history with any mental compulsion to confabulate. Petitioner's argument is wholly speculative. Evidence of petitioner's seizure disorder, standing alone, was not particularly mitigating. Under these circumstances, this court cannot find that petitioner would not have been convicted of the death penalty had evidence of his seizure disorder been admitted.

Finally, petitioner faults his counsel for not investigating his drug and alcohol use. Petitioner states that drug use over a period of time can have long-term effects on an individual's cognitive functioning, especially when an individual suffers a pre-existing organic disorder.

At the outset, the court observes that petitioner has presented no evidence indicating that he abused alcohol to a degree that would warrant presenting it as a mitigating factor. As discussed above, Dr. Globus testified that petitioner suffered from "amphetamine or similarly acting sympathomimetic drug use in remission." (RT 5171.) He later testified that petitioner's drug preferences were stimulants but that he did not use them recreationally. (RT 5177.) He testified that petitioner took these drugs in smaller quantities but steadily. (RT 5178.) This indicated that petitioner was self-medicating himself, as the drugs acted like Ritalin. (RT 5177-5178.) He testified that amphetamines if taken in excess tend to increase aggressivity and make people paranoid. (RT 5179.) Such a drug will make people misunderstand what is going on. (RT 5179.)

In opposition to respondent's motion, petitioner has presented no evidence demonstrating that he used

amphetamines to a degree that resulted in the type of symptoms discussed by Dr. Globus. Dr. Globus testified that petitioner used "smaller quantities" of these drugs and that his drug use was in remission. From this testimony, the court cannot infer that petitioner's use of amphetamines significantly impaired his functioning. Petitioner's claim that it did is unsupported speculation.

Furthermore, not only does petitioner's argument suffer from a lack of factual support, it is also problematic from a legal standpoint. Petitioner merely assumes that all juries are sympathetic to drug and alcohol abusers. This is hardly the case. Dyer v. Calderon, 122 F.3d 720, 734 (9th Cir. 1997) (rehearing en banc granted Oct. 9, 1997) (introduction of drug use incompatible with presentation designed to focus on ability of defendant to act responsibly); Boyle v. Johnson, 93 F.3d 180, 187 (5th Cir. 1996) (drug and alcohol evidence would have been counterproductive); Jones v. Page, 76 F.3d 831, 848 (7th Cir. 1996) (introduction of drug utilization evidence would have opened the door on cross-examination to lengthy record of juvenile delinquency and other callous acts–evidence would have been counter-productive). See also, e.g., California cases in which the jury rejected a drug abuse defense, People v. Cain, 10 Cal. 4th 1, 40 Cal. Rptr. 2d 481 (1995); People v. Mickey, 54 Cal. 3d 612, 286 Cal. Rptr 801 (1991); People v. Frierson, 53 Cal. 3d 730, 280 Cal. Rptr. 440 (1991) (two different juries rejected the defense.); People v. Rich, 45 Cal. 3d 1036, 248 Cal. Rptr. 510 (1988). But see Smith v. Stewart, __ F.3d __ 1998 WL 156529 (9th Cir. 1998) (finding in part that failure to produce evidence of drug abuse was ineffective).[52/]

The court is not being personally judgmental herein, i.e., is not substituting its own views on drug use for that of the

---

52. However, this case cannot be read to provide an absolute rule that requires an attorney to utilize evidence of drug abuse. In any event, the case is distinguishable. In Smith, the attorney essentially produced no evidence and had no theory. As discussed herein, petitioner's counsel produced much evidence concerning petitioner in the penalty phase. Their theory was that petitioner had a difficult upbringing (although the evidence on this point was not significantly existent); they emphasized that petitioner would program well in prison, and that petitioner had a mental excuse for what he had done. Further evidence of drug abuse would not have materially assisted these theories.

reasonable jury. A person's need to use drugs and excessive alcohol can range from a genetic predisposition to no excuse whatsoever, and everything in between. The point is that for whatever reason many juries are not disposed to sympathize with drug and alcohol abusers, and that is the essence of the second Strickland prong– would the outcome have been different if petitioner's drug use had been presented to the jury. The answer is probably not. Petitioner has not presented any extraordinary facts about his drug addiction that would have made him stand out in a sympathetic sense from any of the defendants in the above cited cases in which a drug/alcohol defense was unsuccessful. Rather, petitioner's sole argument is that because drug/alcohol abuse per se was not stressed, he was prejudiced thereby. The court disagrees.

It is highly unlikely that the jury would have found petitioner not guilty of the death penalty had further evidence been presented regarding his drug abuse. Accordingly, this claim should be denied for having been procedurally defaulted.

As this court has found previously, *should this claim have been reviewed on the merits, the court would deny it on the merits for the reasons given above. Furthermore, petitioner has not set forth colorable facts which would require an evidentiary hearing.*

F. Claims XXXIX & XLIII: Cumulative Errors at Both Phases

Although the court noted a couple instances of prosecutorial misconduct, the court has found no significant error at the guilt phase; thus the cumulative error argument for this phase is de minimis. The court has previously found that the penalty phase verdict should be vacated on account of instructional error. (Claims XXXVI, XL) Thus, in the first instance, it is not necessary to cumulate error for purposes of the penalty phase. However, in the event that the district court does not adopt the Findings and Recommendations on instructional error, the undersigned does not find that the remaining errors discussed, pertinent to the penalty phase, would warrant a cumulative error pronouncement. The combination of the Caldwell error at voir dire (which was essentially relevant only to the penalty phase) (Claim XXIV), with the prosecutor's comment about the cost of life imprisonment (Claim XXIX) (procedurally defaulted) are

insufficient to undermine confidence in the jury's death penalty verdict.

G. Claim XLI: Trial Judge Improperly Denied Petitioner's Automatic Motion for Modification of Penalty

Petitioner argues that the trial judge improperly denied his automatic motion to modify the death verdict. Petitioner claims that at the hearing on the motion to modify the sentence, the trial judge 1) considered the absence of certain statutory factors to constitute aggravation; 2) improperly utilized evidence to impermissibly inflate aggravating factors; 3) did not consider mitigating evidence regarding his mental state and his domination by Avette Barrett and Allison Eckstrom; and 4) failed to exercise independent discretion in deciding the motion to modify the penalty judgment.

"After the jury reached its sentence of death, the trial judge was required to 'review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and...make an independent determination as to whether the weight of the evidence supports the jury's findings and verdict.' Cal. Penal Code ¶ 190.4(e)." Williams v. Calderon, 52 F.3d 1465, 1482 (9th Cir. 1995). Assuming the trial judge did err in his weighing of the factors, this is not a situation governed by Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993), where a violation of state law *fundamental* to the state law system has been violated. In such a case, the Ninth Circuit has held that a liberty interest may be created. Rather, the situation is governed here by Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996):

> Langford may not, however, transform a state-law issue into a federal one merely by asserting a violation of due process. We accept a state court's interpretation of state law, see Melugin, 38 F.3d at 1482, and alleged errors in the application of state law are not cognizable in federal habeas corpus. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021, 106 S.Ct. 3336, 92 L.Ed. 741 (1986). Our concern is with Langford's federal rights.

Therefore, petitioner has not stated a federal claim with

respect to this issue.[53]

Even if the court were inclined to review the alleged error of state law, petitioner has not demonstrated any error. First, petitioner alleges that the trial court considered the absence of certain statutory factors to constitute aggravation, although he does not cite which specific statutory factors were absent. The California Supreme Court rejected this claim as follows:

> Defendant also faults the court for converting the absence of any moral justification or extenuation for defendant's conduct (§ 190.3, factor (f)) into an aggravating circumstance. (People v. Lucero (1988) 44 Cal.3d 1006, 1031, fn. 15 [245 Cal.Rptr. 185, 750 P.2d 1342].) He ignores the context of its remarks. The trial court observed that the victim did not participate in the conduct that led to his death and that there was no moral justification or extenuation for defendant's conduct. It then concluded that the absence of this factor (factor (f)) *and* the fact that the crime was committed "out of total disregard for the personal property and the personal well-being of the victim" amounted to a factor in aggravation. Read in context, the court's remarks convey two distinct messages: first, there was no justification for this crime and therefore no mitigating factor arising from the manner of its commission; second, the surrounding circumstances of the crime showed a callous indifference to life and property that aggravated its commission. The circumstances of the crime are a permissible factor in aggravation (§ 190.3, factor (a)). Although the trial court might have chosen its words more carefully, its use of those circumstances in its evaluation is amply supported by the evidence. Again, there was no error. (People v. Coleman, supra, 48 Cal.3d at p. 159.)
>
> Morris, 53 Cal.3d at 233 n. 24, 279 Cal.Rptr. at 770.

Petitioner next claims that the trial court improperly utilized evidence to impermissibly inflate aggravating factors,

---

53. The liberty issue analysis may have been different if the trial court had simply refused to make a § 190.4 determination. However, it cannot be said that every alleged error in the course of an important hearing is a constitutional violation.

although he does not identify any of this evidence. The California Supreme Court addressed this claim as follows:

> There is no merit in defendant's suggestion that the trial court somehow "double counted" his robbery-murder of Van Zandt in considering aggravating circumstances or that it disregarded evidence of his mental condition. As to the first suggestion, the court did not more than comment on the circumstances of the crime, an acknowledged aggravating factor. (§190.3, factor (a).) It did nothing to intimate that it was mechanically counting mitigating and aggravating factors. As to the second suggestion, the court stated that it was considering defendant's childhood and mental condition, although it found that defendant did not suffer from an extreme mental or emotional disturbance. (S 190.3, factor (d).) The trial court was entitled to weigh the credibility of the evidence relating to defendant's background and mental condition and to balance this against other relevant factors. (See, e.g., People v. Morales, supra, 48 Cal.3d 527, 572-573.) It committed no error.

Morris, 53 Cal.3d at 233 n. 23; 279 Cal.Rptr. at 770.

Petitioner next argues that the court did not consider mitigating evidence regarding his mental state and his domination by Avette Barrett and Allison Eckstrom. The court did consider this evidence, but rejected it:

> Pursuant to Section 190.3(g), the defendant argues that he acted under duress or under the substantial domination of another person, that he was so enamored with the presence and the abilities of his paramour that he would do anything include killing another human being for her wishes. This is not convincing. There was no Svengali influence upon the defendant in his conduct or in his emotional state. There was no rock placed in his hand. There was no pushing, shoving or direction given by his paramour. There was no insistence given by Avette, assistance. The defendant decided to do and to carry out the crime with murder. (RT 5376.)

The court similarly considered and rejected petitioner's claim of mitigation based on his mental state:

> The court would find that the offense was committed while the defendant was not under the influence of

> extreme mental or emotional disturbance. The testimony concerning his borderline personality disorder was not convincing. There is no question the defendant has an antisocial personality. It does not mean that the defendant is unable to comprehend the seriousness and the deepness of relationships. It does not mean that he was under any type of extreme mental or emotional disturbance. (RT 5375.)

Contrary to petitioner's claim, the court did consider his mental state and the influence of Avette Barrett. Petitioner is apparently quibbling with the court's weighing of this evidence. This clearly does not state a constitutional claim. Accordingly, for the reasons discussed above, the court recommends that this claim be denied..

H. Claim XLII: California Statute is Unconstitutional in Practice and Application

Petitioner argues that the California death penalty statute is unconstitutional on several grounds. The court will address these arguments separately.

First, petitioner argues that the California statute does not provide for appellate intercase proportionality review. Appellate proportional review is encouraged not but not constitutionally required. Pulley v. Harris, 465 U.S. 37, 45, 104 S.Ct. 871, 877 (1984).

Second, petitioner argues that the extent and breadth of the special circumstances results in a failure to narrow the class of death-eligible persons in the constitutionally required manner. This claim was rejected in Odle :

> The Supreme Court recently explained that special circumstances must meet two requirements: They must not be applicable to every defendant convicted of murder, and they must not be unconstitutionally vague. See Tuilaepa, 512 U.S. at , 114 S.Ct. at 2635. California's special circumstances meet these requirements. Although the statute at the time of Odle's trial listed nineteen special circumstances, they do not encompass every first degree murder. See Cal. Penal Code § 190.2. Nor are they so outside the understanding of a criminal jury as to be unconstitutionally vague. See Tuilaepa, 512 U.S. at , 114 S.Ct. at 2636.

Odle, 884 F.Supp. At 1430.

Third, petitioner argues that the unitary list of sentencing factors fails to narrow the pool of death-eligible persons in any rational manner, results in inconsistent application of sentence, and fails to guide the sentencer. This claim was also rejected in Odle:

> Third, Odle argues that the statutory sentencing factors do not rationally narrow the pool of death-eligible defendants or provide sufficient guidance for the jury to make a rational sentencing decision. The Court has held, however, that the role of California's statutory sentencing factors is not to narrow the class of death-eligible defendants to those who should actually be sentenced to death. See id. at ___ U.S. ___, 114 S.Ct. at 2636-37. Instead, they provide factors for the jury to consider in sentencing the defendant based on his individual character and crime. See id. at ___ U.S. ___, 114 S.Ct. at 2637. For the reasons discussed above (see claims NN and OO), the sentencing factors are not constitutionally infirm.

Odle, 884 F.Supp. at 1431.

Fourth, petitioner argues that the prosecutorial agencies of the several counties are given extensive discretion to choose the individuals to be selected for capital punishment. Petitioner argues that the selection is exercised in an arbitrary and capricious manner, and is based upon inconsistent and undisclosed criteria. Petitioner offers no facts to support this claim.

> In order to challenge a prosecutor's plea bargaining or charging decision, Estrada must establish a prima facie case of invidious discrimination, by showing that (1) others similarly situated to him were not prosecuted or were given more favorable plea bargains; and (2) his prosecution was based on an impermissible motive, i.e. a discriminatory purpose or intent. See United States v. Wayte, 710 F.2d 1385, 1387 (9th Cir. 1983), affirmed 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

United States v. Estrada-Plata, 57 F.2d 757, 760 (9th Cir. 1995).

A defendant challenging the selection of his case for prosecution must demonstrate that the decision makers in his

case possessed the required animus; a defendant may not challenge his selection based on the decisions of others. United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995)(circuit wide discovery in a selective prosecution case was an abuse of discretion).

In the instant case, petitioner has no provided no evidence in support of either of the two factors set forth in United States v. Estrada-Plata, supra. The only basis for this claim appears to be his conclusory allegation. This is not sufficient to withstand summary judgment. Accordingly, respondent should be granted summary judgment as to this claim.[54]

Fifth, petitioner alleges that the system of appellate review of death penalty trials is arbitrary, capricious, and resulted in a denial of appellate due process with respect to the manner in which the state supreme court disposed of the issues raised on petitioner's behalf. Petitioner offers no legal briefing in connection with this claim. Accordingly, respondent should be granted summary judgment as to this claim.

Petitioner next argues that the California system is administered in a way that violates equal protection principles in that a) protections applicable to non-capital defendants are suspended in capital proceedings; b) among the class of similarly situated death-eligible persons, certain individuals are

---

54. In the context of obtaining discovery on a claim for selective prosecution, and hence avoiding summary judgment as well, the federal case of United States v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 1488-1489 (1996) precisely mirrors the standard applied to the claim itself and the standard to be applied in federal habeas.

> The justifications for the rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.
>
> ***
>
> We think the required threshold-a credible showing of different treatment of similarly situated persons-adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the instant case, petitioner has not made a credible showing of different treatment of similarly situated persons. Therefore, he is not entitled to discovery with respect to this claim..

singled out by the prosecution for the death penalty, in the absence of a rational basis
for the distinction. Petitioner offers no evidence to support these allegations. Accordingly, respondent should be granted summary judgment as to this claim.

Finally, petitioner argues that his death sentence is not proportionate to his individual culpability or to the punishment assessed against similarly situated defendants. The court will first examine whether petitioner's sentence is disproportionate to his individual culpability.

Principles of proportionality embodied in the Eighth Amendment prohibit the imposition of the death penalty upon persons who, though guilty of capital murder under state law, did not themselves kill, attempt to kill, or intend to kill. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982). In Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688 (1987), the Supreme Court held that major participation in a the felony committed, combined with a reckless indifference to human life, was sufficient to satisfy Enmund's culpability requirement. Any appropriate tribunal may make the finding of culpability required by Enmund. Cabana v. Bullock, 474 U.S. 376, 392, 106 S.Ct. 689, 700 (1986). Thus a finding by the jury, trial judge, or appellate court may be entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Sumner v. Mata, 449 U.S. 539, 546, 101 S.Ct. 764, 769 (1981).

With respect to this issue, the California Supreme Court found,

> His crime was a heinous and brutal one. After the victim had gone out of his way to help defendant and his companions, defendant viciously attacked and killed him in order to steal his van. He repeatedly struck a defenseless victim over the head with a rock; rolled him down an embankment; and then hit him again with a stick when he tried to get up. There was no conceivable provocation for the offense. Defendant boasted about his crime to at least three people and said he would do it again. He has a prior record of kidnaping and attempted rape. [Footnote omitted.] Under all of the circumstances, there is nothing arbitrary or unfair about the imposition of the death penalty.

Morris, 53 Cal.3d at 235, 279 Cal.Rptr. at 771.

The California Supreme Court's finding that petitioner's

death sentence was not disproportionate to the offense is entitled to a presumption of correctness. This finding of the California Supreme Court is supported by the record. Accordingly, petitioner's claim that his sentence was disproportionate to his individual culpability should be denied.

Petitioner also argues that his death sentence is not proportionate to sentences assessed to similarly situated defendants. "[A]bsent a showing that the...capital punishment system operates in an arbitrary and capricious manner, [the appellant] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." McCleskey v. Kemp, 481 U.S. 279, 306-07, 107 S.Ct. 1756, 1774-75 (1987). In the instant case, petitioner has offered absolutely no evidence that his sentence was disproportionate to other similarly situated defendants. In addition, he has offered no evidence that the death penalty system is operated in an arbitrarily and capricious manner. This claim is based on nothing more than petitioner's unsupported conclusions. For these reasons, this claim should be denied.

Conclusion

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be granted with respect to Claims XXXVI (in part), XV, and denied/dismissed in all other respects.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." *The objections may not exceed thirty (30) pages in length.* Any reply to the objections shall be served and filed within ten days after service of the objections. *The reply may not exceed thirty (30) pages in length.* The parties are

advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 4, 1998.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

IN THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

In Re BRUCE WAYNE MORRIS, Petitioner, On Habeas Corpus.	)	No. [Related to People v. Morris No. 5004781]

PETITION FOR WRIT OF HABEAS CORPUS

MARIANNE D. BACHERS
Attorney at Law
900 North Point Street
Suite 220
San Francisco, CA 94109
(415) 673-8000

Attorney for Petitioner
BRUCE WAYNE MORRIS

Table Of Contents

CLAIMS FOR RELIEF 8

I. AVETTE BARRETT'S TESTIMONY WAS IMPROPERLY ADMITTED BECAUSE IT WAS IMPERMISSIBLY COERCED AND WAS FALSE 8

II. ALLISON ECKSTROM'S TESTIMONY WAS IMPROPERLY ADMITTED BECAUSE IT WAS IMPERMISSIBLY COERCED AND WAS FALSE 12

III. IMPROPER IMPEACHMENT WITH PRIOR CONVICTIONS 15

IV. FAILURE TO DISCLOSE EVIDENCE REGARDING JAILHOUSE WITNESSES 18

V. IMPROPER ADMISSION OF PETITIONER'S STATEMENTS TO LAW ENFORCEMENT OFFICERS 20

VI. PREJUDICIAL EVIDENCE THAT THE TRIAL COURT HAD EXCLUDED WAS ADMITTED AT TRIAL IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS 23

VII. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION OF MURDER 24

VIII. PETITIONER WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS JURY DETERMINATION ON WHETHER HE PREMEDITATED AND DELIBERATED THE HOMICIDE 26

IX. THE FAILURE TO SEQUESTER THE JURY WAS PREJUDICIAL ERROR 27

PENALTY PHASE ISSUES 29

X. ADMISSION OF EVIDENCE CONCERNING THE FACTS UNDERLYING PETITIONER'S PRIOR CONVICTIONS WAS IMPROPER AND UNCONSTITUTIONAL 29

XI. IMPROPER ADMISSION OF EVIDENCE IN AGGRAVATION WITHOUT PRE-TRIAL NOTICE TO THE DEFENSE 31

XII. THE CALIFORNIA STATUTE IS OVERLY BROAD AND VOID FOR VAGUENESS 33

XIII. THE TRIAL COURT FAILED TO DELETE UNNECESSARY FACTORS FROM JURY CONSIDERATION AT PENALTY PHASE .. 34

XIV. INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL 37

XV. PETITIONER'S INCOMPETENCE TO ASSIST COUNSEL 46

XVI. CUMULATIVE ERRORS AT BOTH PHASES OF TRIAL REQUIRE REVERSAL 48

XVII. THE TRIAL JUDGE COMMITTED CONSTITUTIONAL ERROR WHEN IT RESPONDED TO A JURY INQUIRY WITH A LEGALLY INCORRECT RESPONSE AND PERMITTED THE JURY TO DECIDE PETITIONER'S SENTENCE BASED ON FALSE INFORMATION 48

XVIII. THE TRIAL JUDGE IMPROPERLY DENIED PETITIONER'S AUTOMATIC MOTION FOR MODIFICATION OF PENALTY 51

IN THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

In Re BRUCE WAYNE MORRIS, Petitioner, On Habeas Corpus.	)	No. PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE MALCOM M. LUCAS, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Bruce Wayne Morris, by and through his attorney Marianne D. Bachers, petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of the writ.

I.

Petitioner is unlawfully imprisoned under a judgment of conviction and sentence of death at the California State Prison at San Quentin, Tamal, California, by Arthur Calderon, Warden, and James Gomez, Director for the California Department of Corrections. Such judgment was imposed by the Superior Court of San Joaquin County on August 27, 1987, in case number 39143.

II.

The crime occurred on or about September 11, 1985, near Truckee, California. Petitioner and his companions, Avette Barrett and Allison Eckstrom, were arrested inc Nebraska for possession of marijuana for sale. During interrogation by Nebraska authorities, Petitioner, Barrett and Eckstrom disclosed their involvement in the homicide of Ricky VanZant in California. Nebraska authorities relayed this information to California authorities, who located VanZant's body near a wilderness campsite. Petitioner, Eckstrom and Barrett were returned to California, where they faced charges in Sierra

County in connection with VanZant's death.

III.

Petitioner was originally charged in this case in Sierra County, the location where the crime was alleged to have occurred. The defense filed a Motion to Change Venue based on prejudicial pre-trial publicity, and on September 12, 1986, the Sierra County Superior Court transferred the case to San Joaquin County for further proceedings and trial.

IV.

On January 29, 1987, Petitioner was charged in San Joaquin County in an Amended Information (CT 1036-38)) with the following: Count I: murder of Ricky VanZant, on September 12, 1985, with the special circumstance that the murder was committed during the commission or attempted commission of a robbery, pursuant to Penal Code sections 187 and 190.2(a)(17)(vii) [1978]. It was further alleged that Petitioner intended to kill Ricky VanZant. Count II: robbery of Ricky VanZant on September 11, 1985, pursuant to Penal Code section 211. Both of the counts alleged, pursuant to Penal Code section 12022(b), that appellant used deadly weapons -- a tree limb and rock -- in the commission of the respective offenses.

Two prior serious felony convictions were alleged pursuant to Penal Code section 667(a). They were attempted rape and rape in violation of Penal Code sections 664/261 and 220 occurring on September 26, 1977, in Sacramento County; and kidnapping in violation of Penal Code section 207, on February 5, 1980, in Butte County. A prior prison term was alleged pursuant to Penal Code section 667.5(b). This was an escape conviction on May 1, 1980, in San Luis Obispo County.

V.

On January 27, 1987, Petitioner pleaded not guilty to all charges and denied all enhancements. (CT 1050-51).

VI.

Petitioner was tried by jury and sentenced in the Superior Court for the County of San Joaquin, in Stockton, California. Petitioner testified at the guilt phase of his trial. The guilt phase conviction was on June 22, 1987.

VII.

The jury sentenced petitioner to death on July 17, 1987. On August 27, 1987, the trial judge denied petitioner's automatic motion to modify the death sentence and formally entered the judgment of death against petitioner, pursuant to Penal Code section 190.4(e).

VIII.

Petitioner filed an automatic appeal to the California Supreme Court, Crim. No. 26415/S004781. The California Supreme Court affirmed the judgment in all respects on March 28, 1991, and denied a timely petition for rehearing on May 22, 1991. Justices Mosk and Broussard filed separate opinions dissenting from the affirmance of the guilt and penalty judgments. Petitioner was represented on appeal by Attorney Robert Kane. People v. Morris (1991) 53 Cal.3d 152.)

IX.

Petitioner filed a timely petition for certiorari in the United States Supreme Court. The Court denied the petition on November 12, 1991. (Morris v. California (1991) 112 S.Ct. 421.)

X.

On September 7, 1990, in response to this Court's issuance of the Policies for Regarding Cases Arising From Judgments of Death (hereafter "Policies"), Attorney Robert Kane filed a habeas corpus petition on petitioner's behalf in the California Supreme Court. (In re Bruce Wayne Morris on Habeas Corpus, No. S017372.) The Petition alleged that trial counsel had been ineffective and that petitioner's arraignment had been deliberately and unlawfully delayed so that a statement could be obtained from him. The California Supreme Court denied the petition on the merits and without comment on December 13, 1990.

XI.

On July 30, 1992, Marianne D. Bachers was appointed to represent Petitioner by the United States District Court for the Eastern District of California, in the case of Morris v. Vas uez, Civ. S92-0483 EJG/GGH.

X11.

On June 15, 1993, Petitioner filed a Petition for Writ of Habeas Corpus in federal court. On December 6, 1993, United States District Court Judge Edward J. Garcia ordered Petitioner to return to state court to exhaust claims contained in the federal petition which had not previously been presented to the state supreme court. No funds were authorized by the federal court to hire experts or investigators in connection with the filing of the federal petition, or otherwise.

XIII.

On February 9, 1994, Attorney Marianne D. Bachers was appointed to represent Petitioner before this Court. On

September 21, 1994, Petitioner, through counsel, applied to this Court for funds to investigate and retain experts in order to present facts in support of a Petition for Writ of Habeas Corpus. On November 2, 1994, this Court refused Petitioner's request in its entirety.

XIV.

This petition is timely brought at the earliest possible opportunity after denial of Petitioner's request for funds to investigate and to retain experts, and following diligent investigation of the facts presented herein. Counsel has been unduly limited and restricted in the investigative efforts she has been able to exert on Petitioner's behalf due to the refusal of this Court and the federal district court to authorize the expenditure of funds in connection with the presentation of this petition. Because this Court refused the requested funds, counsel must allege the facts contained herein on information and belief in order to exhaust the facts and claims suggested by the information which has been uncovered. Additionally, the failure of counsel on direct appeal to present these facts and claims amounts to the prejudicial ineffectiveness of appellate counsel without tactical justification, for which petitioner should be excused.

Counsel became aware of all of the complete underlying facts and claims pleaded in this petition in the year since this Court refused to fund any expert or investigative assistance in aid of presentation of the state habeas petition. Counsel is presenting the claims in a single petition, rather than piecemeal fashion, so as not to run afoul of the rule against multiple petitions, particularly since appellate counsel presented such a limited petition in conjunction with the direct appeal.

XV.

This petition is necessary because petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of Petitioner's constitutional rights as protected by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the California Constitution, Art. 1, § 7, 13, 14, 15, 16, 17, 24, 26 and 28, and Penal Code § 1473, in that the bulk of the factual bases for these claims lies outside the record developed on appeal.

XVI.

Petitioner requests that the Court take judicial notice of the certified record on appeal and all pleadings on file in this Court in the case of People v. Bruce Wayne Morris, No.

5004781/Crim. 26415, to avoid duplication of those voluminous documents.

Because a reasonable opportunity for full factual development through discovery, access to this Court's subpoena power and an evidentiary hearing has not been provided to Petitioner, the full evidence in support of the claims which follow is not presently obtainable. Nonetheless, the evidence that is obtainable is set out below and pleaded with specificity herein, and adequately supports each claim and justifies the issuance of an order to show cause and relief from Petitioner's unlawful convictions and death sentence.

C. When Avette Barrett appeared to testify at petitioner's preliminary examination on January 22, 1987, the court was notified that an agreement had been reached between Barrett and the prosecution regarding the disposition of her case. Barrett would be permitted to plead guilty to a violation of Vehicle Code section 10851, if she fulfilled conditions of the negotiated disposition. A violation of section 10851 carries a maximum sentence of 2, 3, or 4 years. Her plea would be taken at end of proceedings against petitioner. The conditions of the original plea agreement provide:

1. Avette Barrett did not personally take part in infliction of personal injuries on victim;

2. she will continue to waive time;

3. she will testify honestly, truthfully, and completely in all proceedings;

4. she will make herself available for polygraph if requested by the district attorney;

5. the district attorney will stipulate to her release on her own recognizance after completion of her testimony at petitioner's preliminary hearing;

6. she will not exercise her right to remain silent during these proceedings notwithstanding that she is aware that her statements cam be used against her in proceedings in counties in other states;

7. she will keep the district attorney advised of her address and not leave the state prior to these proceedings being completed;

8. if she violates any of the terms of the plea agreement, her release will be revoked and a warrant issued for her arrest. (CT 843–44.)

D. Ms. Barrett testified at the preliminary examination.

During her testimony, the court called a recess and instructed Ms. Barrett's lawyer to discuss the cooperation agreement with his client, apparently because she did not seem to be fulfilling its terms during her testimony. (CT 853.)

E. After petitioner was bound over for trial on capital murder. charges, the case was transferred to San Joaquin County. Special Prosecutor Gary Rossi was hired to handle the trial. James Reichle, Barrett's former attorney who had negotiated the plea agreement, was made the District Attorney for Sierra County, the county in which the crime occurred. On the eve of trial, two material portions of the agreement were deleted and no penalty for Barrett's violation of the plea agreement was sought by the prosecution. Barrett's plea agreement was modified to delete the requirement that she not have personally taken part in the infliction of personal injuries on the victim. (RT 4213-14). The condition that she take and pass a polygraph test was also omitted.

F. Ms. Barrett testified against Petitioner at the guilt phase of his capital trial and directly implicated him in the capital murder. The trial judge refused to permit inquiry into whether or not Ms. Barrett had been required to take a polygraph test pursuant to the prosecutor's plea agreement, and if so, what the testing results were, even though these were material parts of the earlier plea agreement which Barrett had violated without sanction.

G. The agreement made with Barrett, and her resulting testimony deprived petitioner of the ability fully and fairly to confront Barrett and to defend against capital murder charges. The agreements interfered with jury consideration of whether Ms. Barrett was the actual perpetrator of the VanZant homicide, as petitioner contended, and whether petitioner was factually innocent of capital murder as he contended. The failure to uncover and present this evidence deprived Petitioner of facts which would have impeached Avette Barrett's credibility and undermined her veracity. This proof would have provided the jury with a reason to question Barrett's motives and believability. Without it, the jury was unable to effectively do so. The failure of trial counsel and/or appellate counsel, to investigate and present background evidence showing Ms. Barrett's propensity for violence, manipulation domination and untruthfulness, and other relevant characteristics, was prejudicial ineffective assistance of counsel, without any tactical justification.

H. The agreement was unconstitutional because it encouraged and elicited false and perjurious testimony implicating petitioner in the murder of Ricky VanZant during the pre-trial and trial stages of petitioner's case, when petitioner is factually innocent of capital murder.

I. During his closing argument at guilt phase, the prosecutor admitted that both Barrett and Eckstrom were untruthful in statements made to law enforcement officers, and that Eckstrom was emotionally disturbed, thus raising the possibility that perjury had been committed by one or both. Moreover, the prosecutor's argument established that the plea and immunity agreements were illusory: that no matter what the truth actually was, so long as Eckstrom testified that petitioner was the actual perpetrator of the murder, she would not be prosecuted for the murder herself. (RT 4794-97.)

J. The inclusion of and reliance upon the testimony of Barrett as providing the basis for petitioner's capital prosecution renders the guilt and penalty verdicts unreliable. Moreover, the modification of Barrett's plea agreement on the eve of trial constituted a denial of due process. Barrett received undisclosed benefits from the agreements provided by the prosecution, in violation of Brady v. Maryland, 373 U.S. 73 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Additionally, if the services of a mental health professional were used to enhance Barrett's memory of these events, this information was required to be disclosed to the defense pursuant to Bradv and Gialio. No such disclosure was made here.

K. These errors were not harmless beyond a reasonable doubt and had substantially injurious effect on the trial which actually prejudiced petitioner. It is reasonably likely that in the absence of these errors, petitioner would have received more favorable results at the guilt and penalty trials.

L. The failure of trial and/or appellate counsel to raise and litigate these issues constitutes prejudicial ineffective assistance of counsel without any informed tactical justification.

II.
ALLISON ECKSTROM'S TESTIMONY WAS IMPROPERLY ADMITTED BECAUSE IT WAS IMPERMISSIBLY COERCED AND WAS FALSE.

Petitioner's guilt and penalty verdicts are unconstitutional

under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the California Constitution, Art. I, § 7, 13, 14, 15, 16, 17, 24, 26, 28, because the plea bargain the prosecution negotiated with Allison Eckstrom required that she give specific testimony without regard for the truth or falsity of the testimony to be introduced.

Petitioner alleges the following facts, among others to be added following funding for a complete investigation, discovery, and an evidentiary hearing:

A. On the day she testified at petitioner's preliminary hearing, Allison Eckstrom signed a written plea agreement in juvenile court that gave her complete transactional immunity following conclusion of petitioner's trial. Eckstrom would receive the benefit of the immunity agreement if she met its conditions. (CT 901-02.)

B. The agreement required that her previous statements to law enforcement authorities that she did not personally inflict any injuries on Ricky VanZant be true and correct; that she testify truthfully and completely concerning the death of VanZant; and that she not exercise her right to remain silent even if the testimony implicated her in crimes outside the State of California. The agreement stated that the prosecution was not required to honor its side of the agreement if Eckstrom failed to meet any of its terms.

C. Ms. Eckstrom testified at petitioner's preliminary hearing in Sierra County. Prior to petitioner's trial in San Joaquin County, Ms. Eckstrom immunity agreement was modified to delete the requirement that she not have personally inflicted any injuries upon VanZant.

D. Prior to petitioner's trial, Ms. Eckstrom took and flunked a polygraph test. When she testified at trial, the court refused to permit inquiry into the polygraph test or its results. (RT 3892-95.)

E. During his closing argument at guilt phase, the prosecutor admitted that both Barrett and Eckstrom were untruthful in statements made to law enforcement officers, and that Eckstrom was emotionally disturbed, thus raising the possibility that perjury had been committed by one or both. Moreover, the prosecutor's argument established that the plea and immunity agreements were illusory: that no matter what the truth actually was, so long as Eckstrom testified that petitioner was the actual perpetrator of the murder, she would not be prosecuted for the murder herself. (RT 4794-97.)

F. The agreements made with Eckstrom and her resulting trial testimony deprived petitioner of the ability to fully and fairly to defend against capital murder charges because the agreements interfered with jury consideration of whether Ms. Eckstrom was a co-perpetrator of the VanZant homicide and whether petitioner was actually innocent. The failure of trial counsel to investigate and present background evidence showing that Ms. Eckstrom had the propensity to act violently, to dominate others, to be untruthful, and to manipulate others, as well as other relevant character traits, was prejudicial ineffective assistance of counsel, without any tactical justification.

G. The plea agreements were unconstitutional because they encouraged and elicited false and perjurious testimony implicating petitioner in the murder of Ricky VanZant during the pre-trial and trial stages of petitioner's case, when petitioner was factually innocent of capital murder.

H. Eckstrom testified that her memory of events concerning the homicide had been improved by "dreams". (RT 3948-49.) This testimony suggested that the witness may have been treated by a mental health expert who hypnotically induced memories of the events which were the subject of Eckstrom's testimony. The prosecution was required to disclose this information to the defense.

I. The inclusion of and reliance upon the testimony of Eckstrom as providing the basis for petitioner's capital prosecution renders the guilt and penalty verdicts unreliable. Eckstrom received undisclosed benefits from the agreements provided by the prosecution, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The use of mental health professionals to assist Eckstrom in recovering memories about this incident was required to be disclosed to the defense pursuant to Brady and Giglio. No such disclosure was made.

J. These errors were not harmless beyond a reasonable doubt and had substantially injurious effect on the trial which actually prejudiced petitioner. It is reasonably likely that in the absence of these errors, petitioner would have received more favorable results at the guilt and penalty trials. The failure of trial and/or appellate counsel to have investigated and litigated these issues amounts to prejudicial ineffective assistance of counsel for which no informed tactical justification exists.

III.
IMPROPER IMPEACHMENT WITH PRIOR CONVICTIONS.

Petitioner was unlawfully convicted and sentenced to death in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the California Constitution, Art. I, § 7, 13, 14, 15, 16, 17, 24, 26, 28, when the trial court improperly admitted prior convictions against him for impeachment at the guilt phase of his capital trial.

Petitioner alleges the following facts, among others to be added following discovery, funding for a complete investigation and evidentiary hearing:

A. Prior to trial, petitioner moved to have his prior convictions excluded from use as impeachment should he choose to testify in his own defense. (CT 989-995). Petitioner moved to exclude his prior convictions for: simple kidnap (1980, Butte County); escape (1980, San Luis Obispo County); attempted rape (1978, Sacramento County); assault with intent to commit rape (1978, Sacramento County); and car theft (1977, Sacramento County). The trial judge refused to exclude the convictions, even though some of them bore substantial similarity to the offenses for which petitioner was then on trial. Trial counsel considered but then abandoned any factual investigation of the prior crimes. (RT 3144, 4949.) The Court's rulings interfered with that process. (RT 3146.)

B. Petitioner testified in his own defense at the guilt phase. (RT 4592-4719, 4743-67). His testimony was a crucial component of the guilt phase defense. Petitioner was impeached with his prior convictions. (RT 4603, 4627).

C. The prior convictions should not have been admitted against Petitioner because the convictions were constitutionally invalid, for the following reasons:

1. The attorneys who represented petitioner in each prior criminal proceeding were prejudicially ineffective.

2. Each of petitioner's prior attorneys failed to properly investigate petitioner's mental health background, his family background, the underlying defenses available to petitioner, petitioner's competence to aid and assist in his own defense and to rationally understand the charges against him.

3. Had petitioner's prior attorneys conducted such an investigation they would have found that petitioner had a

documented history of organic brain damage from the time he was approximately four years old.

4. Petitioner's organic brain damage caused him to lose consciousness and lose whole blocks of time for which he could not account. This condition existed from early childhood and still exists to this day. As a result of the organic brain damage, petitioner often admitted actions for which he bore no responsibility. Petitioner confabulated about the events for which he was prosecuted in these prior cases, when in fact he did not commit the acts which he admitted. This confabulation was the direct result of his organic brain damage. Had petitioner's prior attorneys investigated the facts underlying the prior crimes adequately and had they investigated petitioner's mental functioning, they would have uncovered factual defenses to the charges which demonstrated the confabulation on petitioner's part and also established petitioner's innocence of the crimes.

D. Petitioner's trial counsel in the capital case knew that Petitioner had confabulated about the events in the capital case during his statement when he admitted killing VanZant. Attorney Condit told the trial court that it was incorrect that Petitioner wanted to leave Sacramento to escape members of organized crime. (RT 3147.) And, at trial, Avette Barrett testified that Petitioner believed her to be pregnant when they left Sacramento, but she had never told him that. (RT 4045-46.) These facts had figured prominently in the "confession" Petitioner gave to Nebraska authorities. Evidence that these claims were incorrect should have alerted counsel to the possibility that Petitioner had previously made similar attempts to take responsibility for incidents for which he was not the perpetrator, and was therefore improperly convicted for those prior crimes.

1. In fact, Petitioner asserted he was running from prison gangs when he left the San Luis Obispo prison in 1980. The pregnancy of a female friend also played a role in that case. A witness suggested that a female in Petitioner's company was exercising control and domination over him during those events.

E. These facts suggested that a complete factual investigation into the prior convictions was necessary in order to mount an attack on their constitutional validity. Petitioner had mental defenses and factual defenses to the priors which were not uncovered and were unpresented, due to the

prejudicial ineffectiveness of his original attorneys, which was without informed tactical justification.

F. Improper admission of the invalid prior convictions deprived petitioner of his right to present an effective defense at both phases of his capital trial and to fair and reliable jury consideration of defenses to capital murder and death sentencing.

G. The admission of this evidence was not harmless beyond a reasonable doubt, and it is reasonably likely that a more favorable result would have occurred in the absence of such error. The failure of trial and/or appellate counsel to raise and litigate these issues was prejudicially ineffective, without informed tactical justification.

IV.
FAILURE TO DISCLOSE EVIDENCE REGARDING JAILHOUSE WITNESSES.

Petitioner was unlawfully convicted and sentenced to death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, Art. I, § 7, 13, 14, 15, 16, 17, 24, 26, 28, when the prosecutor failed to disclose to the defense evidence of benefits expected and/or to be conferred upon prosecution witness Anthony Brooks in exchange for his testimony implicating Petitioner in a supposed escape plot.

Petitioner alleges the following facts in support of this claim, among others to be added following further discovery, adequate funding for complete investigation, and an evidentiary hearing:

A. It was the prosecutor's contention that Petitioner had planned an escape and discussed it with inmate Anthony Brooks while he was incarcerated prior to trial. (RT 4160-62.)

B. The prosecutor failed to disclose bargains with Anthony Brooks, the witness who provided the evidence concerning the escape plot and with Charles Wharton, who gave other inculpatory testimony. (RT 3814-3824.) The failure to disclose that Brooks was going to be freed from incarceration and was freed, well in advance of his anticipated release date violated Brady v. Marvland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). This non-disclosure precluded petitioner from investigating, confronting and cross-examining Brooks about his agreements and the circumstances

surrounding petitioner's supposed making of these statements.

C. Trial and/or appellate counsel were prejudicially ineffective, without justification, for failing to investigate the circumstances under which petitioner was alleged to have made these statements. Had they conducted such an investigation and consulted appropriate experts, they would have learned that petitioner was not mentally responsible for such statements; that he confabulated the statements and/or that he did not in fact make such statements.

D. The admission of the evidence actually prejudiced petitioner and had a substantially injurious effect on the trial. It deprived petitioner of a fundamentally fair guilt and penalty trial and fair jury consideration of defenses he presented.

V.
IMPROPER ADMISSION OF PETITIONER'S STATEMENTS TO LAW ENFORCEMENT OFFICERS.

Petitioner's guilt and penalty verdicts are unconstitutional under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the California Constitution, Art. I, § 7, 13, 14, 15, 16, 17, 24, 26, 28, due to the admission at his capital trial of statements he made to law enforcement officers both before and after his arrest in this case.

Petitioner alleges the following facts, among others to be added following complete funding for adequate investigation, discovery and an evidentiary hearing, in support of this claim:

A. On September 15, 1985, officers of the Nebraska State Police approached the motel room where petitioner, Barrett and Eckstrom were staying in Lexington, Nebraska. At the time the officers approached the room and knocked on the door, they believed that petitioner was the driver of a van which contained a substantial amount of marijuana -- an offense which constituted a felony in Nebraska.

B. The officers knocked on the door, announced themselves, and petitioner opened the door. Without giving any Miranda warnings, State Trooper Marlin Kuxhausen asked Petitioner if he was the driver of the suspect van. Petitioner said that he was. Petitioner, Barrett and Eckstrom were all then arrested for possession of marijuana.

C. The failure to give Miranda warnings when petitioner

was subjected to this custodial interrogation rendered petitioner's statements inadmissible. Nevertheless, the statement was admitted at petitioner's trial. The admission of the statement was not harmless beyond a reasonable doubt. It is reasonably likely that a more favorable result would have occurred at both phases of the trial in the absence of these errors.

D. After petitioner was taken into custody and was advised of his Miranda rights, he invoked his rights to silence and to counsel. Interrogation ceased.

E. Approximately 13 hours later, Barrett and Eckstrom had been arraigned on the marijuana charges. Petitioner's arraignment was purposefully delayed so that a statement could be obtained from him. The delay in arraignment, the conditions surrounding Petitioner's arrest and confinement in Nebraska, petitioner's own mental disabilities, petitioner's confabulated belief that Avette Barrett was pregnant, among other things, caused petitioner to summon law enforcement authorities and ultimately make an inaccurate confession to them. Petitioner asked that Barrett and Eckstrom not be charged with any crime concerning the death of VanZant. Petitioner requested and was permitted the opportunity to speak with Barrett. These circumstances all combined to overcome Petitioner's will and caused him to give a statement to authorities he would not otherwise have given.

F. Petitioner signed an invalid waiver of Miranda rights and was questioned and gave information falsely proclaiming sole responsibility for the VanZant homicide. The information obtained as a result of this unlawful interrogation was false and unreliable and improperly and prejudicially admitted at guilt phase. The admission of this evidence was not harmless beyond a reasonable doubt and contributed substantially to petitioner's convictions and sentence of death. It is reasonably likely that a more favorable result would have occurred at both phases of trial in the absence of these errors.

G. Petitioner was arraigned after making the statement described in paragraph F, above. Thereafter, he made another statement without being given Miranda warnings and in the absence of the assistance of counsel, which he had requested. These unconstitutionally obtained statements were improperly and prejudicially admitted at guilt phase against petitioner, and contributed substantially to his convictions and sentence of death. It is reasonably likely that results more favorable to

petitioner would have occurred at both phases of the trial in the absence of these errors.

H. The introduction of petitioner's statements, violated petitioner's rights not to incriminate himself, to the assistance of counsel, to a reliable determination of guilt at his capital trial, and to due process and fundamental fairness. Petitioner's right to a speedy arraignment and to the appointment and assistance of counsel were improperly denied.

1. Moreover, petitioner's statements after arrest were the fruit of the unlawful interrogation which occurred at the motel room, as well as failures to honor his assertion of the right to counsel, and to silence.

J. Petitioner's statements were confabulated and unreliable and were the product of his organic brain damage and underlying mental impairments.

K. Any failures of trial counsel and/or appellate counsel to object to the admissibility of petitioner's statements on the grounds claimed herein constituted prejudicial ineffective assistance which was not the result of an informed tactical decision.

VI.
PREJUDICIAL EVIDENCE THAT THE TRIAL COURT HAD EXCLUDED WAS ADMITTED AT TRIAL IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

Petitioner's convictions and sentence of death were unlawfully obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28, when taped statements of petitioner played to the jury contained information the judge had excluded as prejudicial, and when the prosecutor elicited evidence during his cross-examination of petitioner that the trial judge had also excluded.

Petitioner alleges the following facts in support of his claim, among others to be added after receiving full funding for an adequate investigation, complete discovery and an evidentiary hearing:

A. Petitioner incorporates the allegations contained in Claim V, above.

B. Petitioner made a statement to Nebraska authorities

following arrest. A part of it was tape-recorded. Petitioner stated on the tape that he left Sacramento because he was in trouble with some underground people who were going to kill him. This evidence was ordered deleted from the recording upon defense objection, but the prosecutor nevertheless questioned Petitioner about the statement. (4682-85.)

C. During his cross-examination of petitioner, the prosecutor inquired about a statement petitioner had made to Nebraska authorities that he wouldn't "cop to nothing I ain't done". This evidence had been excluded as prejudicial by the trial judge, but the prosecutor inquired about it anyway. Any admonition given by the judge to the jury was insufficient to cure the prejudice to petitioner by the prosecutor's improper attempt to circumvent the judge's ruling.

D. The treatment of this issue by the state supreme court amounts to a denial of appellate due process. This Court improperly altered the theories upon which admissibility of the evidence at trial was adjudicated, and thereby deprived petitioner of appellate due process.

E. The prejudicial admission of this evidence deprived petitioner of a fundamentally fair trial and a reliable result at both phases of his capital trial. This error was not harmless beyond a reasonable doubt and had substantially injurious effect on the trial which actually prejudiced petitioner. It is reasonably likely that a more favorable result would have occurred at both phases of petitioner's trial in the absence of these errors.

F. Additionally, trial counsels' failure to ensure that the excluded evidence was not admitted amounted to prejudicial ineffective assistance of counsel for which there can be no tactical justification.

VII.
THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION OF MURDER.

Petitioner's convictions and sentence of death were unlawfully obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28, when the evidence presented by the prosecution was legally insufficient to prove petitioner was guilty of capital murder or of murder.

Petitioner alleges the following facts in support of his

claim, among others to be added after funding for an adequate investigation, complete discovery and an evidentiary hearing:

A. Petitioner was prosecuted on theories of felony-murder, with an additional requirement that the jury find he intended to kill Ricky VanZant.

B. Petitioner incorporates Claims I and II. The evidence provided by Avette Barrett and Allison Eckstrom was insufficient as a matter of law to establish that petitioner murdered, or that he intended to kill VanZant, because it was untruthful and the result of plea or immunity negotiations that were designed to obtain evidence false and perjurious testimony implicating petitioner as the actual perpetrator even when he was not guilty of murder and harbored no intent to kill.

C. Even if believed, the testimony of Barrett and Eckstrom was insufficient to prove that petitioner intended to kill VanZant. Barrett testified it was her idea to kill VanZant, not petitioner's. Both gave testimony that suggested petitioner had no intent to kill. Their evidence, if worthy of belief, proved only that petitioner wanted to take the van, not that he entertained an independent intent to kill.

D. Petitioner denied at trial that he committed the killing of VanZant. He testified that Barrett and Eckstrom killed VanZant. (RT 4592-4766.)

E. The trial evidence was insufficient as a matter of law to establish petitioner was guilty of murder, or that he intended to kill, or to establish petitioner's death eligibility.

F. Conviction under these circumstances deprived petitioner of a fundamentally fair and reliable result at the guilt phase of his trial because he is factually innocent of murder. Petitioner was substantially and actually prejudiced by this error because he would not have been subjected to the penalty phase had he been acquitted of first degree murder.

G. The failure of trial or appellate counsel to raise these issues beforehand constitutes prejudicial ineffective assistance of counsel without any tactical justification.

VIII.
PETITIONER VAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS JURY DETERMINATION ON WHETHER HE PREMEDITATED AND DELIBERATED THE HOMICIDE.

Petitioner guilt phase convictions and sentence of death

were imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28, because the jury was not instructed that, before it could return a true finding on the felony murder special circumstance, it must unanimously find that petitioner premeditated and deliberated the killing.

Petitioner alleges the following facts, to be supplemented following further investigation, discovery, and evidentiary hearing, in support of this claim:

A. Petitioner was charged with a robbery special circumstance. His jury was instructed pursuant to then controlling law (Carlos v. Superior Court, 35 Cal.3d 131 (1983)) that they must find that petitioner intended to kill before finding the felony murder special circumstances to be true. The jury was not told that it must also find that petitioner premeditated and deliberated the killing.

B. The failure to require a finding of premeditation and deliberation on the special circumstances violated due process guarantees of the Fourteenth Amendment, and Eighth Amendment guarantees in favor of reliability and against arbitrariness, capriciousness, and cruel and unusual punishment in capital decision-making, because it permitted death eligibility for an individual who harbored an insufficient mental state: one who intended to kill but did not premeditate or deliberate a killing.

C. Permitting death eligibility to be found for an individual who did not premeditate and deliberate a homicide violates Fourteenth Amendment guarantees of equal protection of laws. There was no compelling state interest which justified differentiation in the treatment of offenders who intend to kill but do not premeditate and deliberate a killing.

D. It is reasonably probable that in the absence of this error a result more favorable to petitioner would have occurred at trial. The failure of trial and/or appellate counsel to raise and litigate this issue constitutes prejudicial ineffective assistance without any justification.

IX.
THE FAILURE TO SEQUESTER THE JURY WAS PREJUDICIAL ERROR.

Petitioner's convictions and sentence of death were unlawfully obtained in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28 when the trial judge refused to sequester the jury during trial.

Petitioner alleges the following facts in support of his claim, among others to be added after further investigation, discovery and evidentiary hearing:

A. Petitioner moved the trial court to sequester the jury during the trial so that the jury would not be exposed to prejudicial publicity or other improper influences. The trial judge improperly denied the motion and petitioner was prejudiced thereby.

B. The failure to sequester permitted the jury to be exposed to prejudicial outside influences (RT 4965) which the trial court commented upon, and which interfered with the jurors' ability fairly to decide the guilt phase conviction issues and whether petitioner should be sentenced to death.

C. The failure to sequester deprived petitioner of his right to a fair jury trial, and to a rational, reliable result at both phases of his capital trial. This error was not harmless beyond a reasonable doubt. The failure of trial and/or appellate counsel to raise and litigate this issue amounts to prejudicial ineffective assistance, without justification.

PENALTY PHASE ISSUES

X.

ADMISSION OF EVIDENCE CONCERNING THE FACTS UNDERLYING PETITIONER'S PRIOR CONVICTIONS WAS IMPROPER AND UNCONSTITUTIONAL.

Petitioner's death sentence was unlawfully and unconstitutionally imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28 because the prosecution introduced, and the sentencer considered as factors in aggravation at the penalty trial, unconstitutionally remote and insufficient evidence of prior criminal conduct for which petitioner was never charged or convicted.

Petitioner alleges the following facts, among others to be

added following funding for an adequate investigation, complete discovery and an evidentiary hearing, in support of this claim:

A. Over defense objection, the prosecution was permitted to introduce evidence surrounding petitioner's prior felony convictions, pursuant to Factor C, for kidnapping, attempted rape, and assault with intent to commit rape. These convictions occurred following a jury trial on May 31, 1978. Petitioner's conviction on February 28, 1980, for kidnapping was also admitted. Petitioner's counsel stipulated to the convictions.

B. Retired Oroville Police Officer Carl Spinale had been the investigating officer on the 1980 kidnapping. He testified about the kidnapping and related events. (RT 497081.)

C. Theresa Williams, petitioner's former girlfriend and the ostensible victim of the 1978 offenses, also testified about the events surrounding those convictions. (RT 498393.)

D. Petitioner's right to due process of law, and the constitutional requirement of reliability in capital sentencing, were violated because petitioner was forced to defend himself against allegations of unrelated criminal conduct which had not been investigated and which was not adequately challenged by his trial attorneys. (RT 4949.) Trial counsels' stipulation to the convictions in the absence of investigation to determine the validity of the prior convictions amounted to prejudicial ineffectiveness which was not the result of an informed tactical decision.

E. Had trial counsel and/or appellate counsel investigated the prior conviction, they would have found that it was unconstitutional for several reasons. Petitioner was not competent to have been tried in 1980 due to his longstanding, documented organic brain damage. This condition was unimvestigated and undiscovered by trial counsel who represented Petitioner in connection with the 1980 case. Petitioner was also incapable of formulating the mental state necessary for conviction in the 1980 case, another condition uninvestigated and undiscovered by counsel in the 1980 case.

F. Investigation by trial and/or appellate counsel would also have uncovered evidence which would have impeached the truth and veracity of Theresa Pugh's testimony and shown that during the late 1970's, she had a relationship with Petitioner of which her father disapproved. Pugh's prior testimony and statements to authorities and family, and during the capital trial, were substantially influenced by this disapproval. The failure to

uncover and present this evidence was ineffective assistance of counsel, without justification.

G. Introduction of evidence related to these prior events, particularly the 1980 kidnapping, violated the rules of Booth v. Maryland, 482 U.S. 496 (1987), and Payne v. Tennessee 501 U.S. __, 111 S.Ct. 2596 (1991), because the prosecutor introduced victim impact evidence concerning those offenses and argued constitutionally impermissible inferences from such evidence during his penalty summation.

H. These errors deprived petitioner of his right to a fair jury trial, and to a rational, reliable result at both phases of his capital trial. These errors were not harmless beyond a reasonable doubt. These errors had a substantial and injurious effect on the outcome of petitioner's trial. He was actually prejudiced by this error.

XI.
IMPROPER ADMISSION OF EVIDENCE IN AGGRAVATION WITHOUT PRE-TRIAL NOTICE TO THE DEFENSE.

Petitioner's sentence of death was unlawfully and unconstitutionally imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28 because the trial court admitted unreliable and inflammatory evidence in aggravation of penalty that the prosecution, in violation of petitioner's due process and state statutory rights, had not disclosed to the defense prior to trial.

Petitioner alleges the following facts, among others to be added following full funding for an adequate investigation, complete discovery and an evidentiary hearing, in support of this claim:

A. Petitioner incorporates the allegations set forth in Claim X, above.

B. Petitioner was entitled, under California law in effect at the time of his trial to pretrial notice of any and all evidence to be presented by the prosecution in aggravation of penalty.

C. The trial court permitted the prosecution to present evidence surrounding petitioner's prior convictions in violation of the notice requirement. Defense counsel objected to admission of this evidence. (RT 4948-49). Petitioner was substantially prejudiced by the admission of this evidence.

D. The admission of Officer Spinale's and Theresa

Williams' penalty phase aggravation testimony, without the pretrial notice required under California law, violated petitioner's federal due process right to a trial free from arbitrary deprivations of state law procedural guarantees. Admission of this testimony further violated petitioner's due process rights to notice and an opportunity adequately to challenge the penalty phase aggravation evidence, as well as his right to confront witnesses and to the effective assistance of counsel.

E. The admission of the challenged testimony placed inherently unreliable and inflammatory testimony before the jury, in violation of the Eighth Amendment requirement of reliability in capital sentencing.

F. It is reasonably likely that a result more favorable to petitioner would have occurred in the absence of this error. The failure of appellate counsel to raise and litigate this issue is prejudicial ineffective assistance, without justification.

XII.
THE CALIFORNIA STATUTE IS OVERLY BROAD AND VOID FOR VAGUENESS.

Petitioner's sentence of death was unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 and 28 because the sentencing jury was instructed to consider factors in aggravation which were constitutionally overbroad and void for vagueness.

Petitioner alleges the following facts, among others to be added following further investigation, discovery and evidentiary hearing, in support of this claim:

A. The California statute, and the instructions petitioner's jury received about consideration of aggravating evidence, were constitutionally overbroad and vague, in violation of Stringer v. Black, (1992) 112 S.Ct. 1130, and Bacigalupo v. California, (1992) 113 S.Ct. 32 (1992), because Factors A, B and C all duplicate findings made at guilt phase. By permitting the sentencing to rely on this evidence to determine whether petitioner should live or die, the California statute fails to narrow the class of death eligible individuals and permits a death judgment to be based upon constitutionally overbroad and vague criteria.

B. This stacking of the guilt phase convictions, special circumstances and prior convictions in violation of due process and fundamental fairness resulted in an automatic and artificial cumulation of aggravating circumstances, which had the probable effect of encouraging the jury -- which was instructed to impose death if aggravation outweighed mitigation -- to consider petitioner more deserving of the death penalty. By permitting the jury to use the underlying convictions and special circumstance as aggravating factors and also to determine petitioner's death eligibility at guilt phase deprived the petitioner of the constitutionally required narrowing criteria for rationally distinguishing among those defendants who should suffer the death penalty and those who should not. Alone and in conjunction with other instructions and the prosecutor's argument, this artificial inflation of the factors in aggravation skewed the penalty phase weighing process in favor of aggravation and injected an impermissible element of unreliability into the jury's capital sentencing determination.

XIII.
THE TRIAL COURT FAILED TO DELETE UNNECESSARY FACTORS FROM JURY CONSIDERATION AT PENALTY PHASE.

Petitioner's sentence of death was unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 because the trial court instructed the jury to "consider, take into account, and be guided by" at least five mitigating factors that were irrelevant to any evidence admitted at trial, without indicating which factors were relevant in aggravation and which in mitigation of the penalty, thereby inviting the jury, as the prosecutor had erroneously argued, to treat the absence of these mitigating factors as factors in aggravation.

Petitioner alleges the following facts, among others to be added following further investigation, discovery and evidentiary hearing, in support of this claim:

A. The trial court instructed the jury as follows concerning the factors it was to "consider, take into account, and be guided by" in determining penalty:

1. The circumstances of the crimes of which the defendant has been convicted in the present trial.

2. The existence of the three special circumstances which the jury has found to be true.

3. The presence or absence of criminal activity by the defendant in addition to the crimes for which the defendant has been found guilty in this case, and which involved the use of or the express or implied threat to use force or violence.

4. The presence or absence of a prior felony conviction by the defendant.

5. Whether or not the offenses of which the defendant has been convicted were committed while the defendant was impaired by the effects of mental or emotional disturbance.

6. Whether or not at the time of the offenses the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect.

7. Whether or not the offenses of which the defendant has been convicted were committed while the defendant was impaired by the effects of alcohol and/or drugs.

8. Whether or not the defendant acted under the domination of another person in the commission of the crimes for which you have found him guilty.

9. Whether or not the defendant was an aider and abettor to the offenses and whether or not his participation in the commission of the offenses was relatively minor.

10. The age of the defendant at the time of the crime.

11. Any other circumstance which extenuates the gravity of the crimes even though it is not a legal excuse for the crimes.

12. Any other aspect of the defendant's character or record that supports a verdict of confinement in state prison for life without the possibility of parole rather than a verdict of death. (RT 5333-34).

B. Nothing in the court's instructions designated which of these factors were aggravating and which were mitigating.

C. Because of the "whether or not" wording of these factors, it is reasonably likely that the court's instruction led the jury to believe that the absence of evidence of any factor established factors in aggravation. Alternatively, because the factors fail to specify which are to be considered as aggravation and which are to be considered as mitigation, the jury was permitted to use mitigating evidence in aggravation. The prosecutor invited such an interpretation in his closing

argument. (RT 5284).

D. Alone and in conjunction with other penalty phase instructions and the prosecutor's improper closing argument, the court's instruction on irrelevant mitigating factors -- and its failure to designate which factors were potentially relevant as aggravation end which as mitigation -- led to an artificial inflation of the factors in aggravation, which skewed the penalty phase weighing process and injected an impermissible element of unreliability into the jury's capital sentencing determination.

E. It is reasonably likely that a result more favorable to petitioner would have occurred in the absence of this error. The failure of trial and/or appellate counsel to raise this issue amounts to prejudicial ineffective assistance of counsel, without justification.

XIV.
INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

Petitioner's sentence of death was unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 because the trial and appellate attorneys who represented him provided ineffective assistance of counsel.

Petitioner alleges the following facts, among others to be added following funding for adequate investigation, complete discovery and an evidentiary hearing, in support of this claim:

A. Counsel unreasonably failed to challenge for cause jurors whose bias was unquestionably shown and to exercise peremptory challenges against these jurors.

B. Counsel unreasonably failed to investigate evidence concerning petitioner's background and upbringing and present it at both phases of his capital trial. This information was material, relevant and crucial to defenses presented at both phases. The failure to conduct this investigation and present this evidence was not the result of an informed tactical decision.

C. Counsel failed to investigate and present background evidence concerning Avette Barrett and Allison Eckstrom.

1. Had trial counsel conducted such an investigation, they would have learned that Barrett was a thief and liar. Acquaintances with whom she had been living just

before the VanZant homicide believed her to have stolen money and property from them. When confronted with the suspicions of these people, Barrett lied about her involvement in the thefts.

2. Barrett and Eckstrom were known to friends and family as skilled manipulators who took advantage of those around them. Had trial counsel investigated Barrett and Eckstrom's background, they would have learned that Barrett and Eckstrom had often convinced others to take responsibility for bad acts they themselves had committed in order to escape punishment for their own misdeeds.

3. Eckstrom's juvenile court record contained evidence of these facts. Trial counsel's failure to use such evidence in order to investigate and impeach Eckstrom was prejudicial ineffective assistance of counsel.

4. Barrett and Eckstrom had been subjected to abuse and neglect in the family home for many years. These conditions taught them to be pathologically dishonest in their dealings with others, particularly those in positions of official authority.

5. The Barrett and Eckstrom evidence was material to petitioner's guilt and penalty defenses. It was the defense contention that Barrett and Eckstrom had committed the VanZant homicide and that their trial testimony was untrue. Had trial counsel investigated and presented this evidence, as well as other evidence developed from these leads, evidentiary support for these claims would have been available and the jury would have had an evidentiary basis upon which to vote to acquit.

6. The failure to uncover such evidence substantially prejudiced petitioner, and deprived him of his right effectively to confront and cross-examine his main accusers. Moreover, such evidence would have impeached Ms. Barrett and Ms. Eckstrom and would have demonstrated that their testimony was perjurious. Such investigation would also have uncovered impeaching information about the agreements negotiated with the prosecution which were undisclosed to trial counsel; and would have proved that Eckstrom and Barrett were the perpetrators and petitioner was factually innocent of murder and capital murder.

D. Counsel failed to investigate and present background evidence concerning jailhouse informants Wharton, Weaver and Anthony Brooks.

1. Trial counsel did not investigate the conditions

of Petitioner's pre-trial confinement in the Sierra and Colusa County jails. Had they done so, they would have learned that the informants had access to documentation concerning Petitioner's case and that was the source of their testimony, not the Petitioner. They would also have learned that the cooperating inmates discussed amongst themselves and with others the benefits to be gained by testifying against Petitioner. This evidence would have impeached the informants and would have demonstrated that their testimony was perjurious. Such investigation would also have uncovered impeaching information about plea agreements or other benefits negotiated with the prosecution which were undisclosed to trial counsel. Such investigation would have shown that the evidence presented by these witnesses was obtained in violation of Massiah v. United States, 377 U.S. 201 (1964).

2. The informants testified that they did not receive any benefits for their testimony. However, each inmate was released from custody, in advance of their expected release date, after testifying against Petitioner at trial. This state of affairs suggests that there was a quid pro quo for the testimony.

3. This evidence was material to petitioner's guilt and penalty defenses. The failure to uncover such evidence substantially prejudiced petitioner and deprived him of his right to effectively confront and cross-examine his accusers and to present a defense to the charges against him.

E. Counsel failed to investigate and present background evidence concerning Ricky VanZant. Counsel unreasonably rejected the use of evidence material to petitioner's defense. (RT 130-31).

1. It was the defense contention that VanZant had sexually assaulted Avette Barrett, and that Barrett had then killed VanZant in retaliation. The prosecution theorized that VanZant was killed by Petitioner in order to steal his van and money and leave California with Barrett and Eckstrom.

2. Evidence in police reports and/or presented at trial suggested investigative leads which, if followed, would have lead to evidence supportive of the guilt phase defense. VanZant's mother testified that the last known address she had for her son was at "Tommy Knockers Feed Store". (RT 3156-57.) In fact, Tommy Knockers is a porn shop in the Carson City area. (RT 3782.)

3. The coroner testified that VanZant's body was covered with tatoos. (RT 3478.) He also testified that VanZant

had advanced arteriosclerosis for a 28 year old, as well as periportal fibrosis, a condition which precedes the development of cirrhosis of the liver. These conditions are consistent with a person who drinks a great deal of alcohol. (RT 3515-16.)

4. VanZant also had convictions for alcohol related offenses. (RT 130-31.)

5. These leads suggested that VanZant was a heavy drinker whose drinking caused him to get in trouble with the law. It also suggested that he had an attitude towards women which might cause him to objectify them, especially when under the influence. The tatoos on his body may also have given an indication of his attitudes towards women. Had these investigative leads been followed, trial counsel could and would have discovered evidence establishing that VanZant had a habit of assault and violence towards women, especially when drinking. These facts would have bolstered the defense contentions in a critical manner -- to show that VanZant was capable of and did assault Barrett, and that sexual assault led to the homicide, not a plan to steal the van.

6. The undiscovered evidence was material to petitioner's guilt and penalty defenses. The failure to uncover such evidence substantially prejudiced petitioner, and deprived him of his right to defend against murder and robbery charges, and to present evidence in his own defense.

F. Trial counsel failed to investigate and challenge the forensic evidence the prosecution presented at trial by consulting with appropriate defense experts and challenging the conclusions at trial of the forensic experts.

1. Trial counsel failed to have a pathologist evaluate the conclusions and testimony of the prosecution coroner in this case. Had such an expert been hired, s/he could have disputed critical but uncertain conclusions established by the prosecution coroner.

2. The coroner testified concerning the blood alcohol level of VanZant's blood. (RT 3516-19.) He stated there was no alcohol in the blood. (RT 3504.) A defense expert could have disputed this conclusion and established that the condition of VanZant's body, among other things, resulted in the complete dissolution of a high level of alcohol in the body.

3. A defense expert could also have successfully disputed conclusions that coroner made about the time of death (RT 3498), whether VanZant was able to pull himself up after being moved (RT 3500), and the blood found on VanZant's

clothing (RT 3483).

G. Counsel unreasonably failed to investigate and present additional available mental state evidence at both phases of petitioner's capital trial, despite receiving early and repeated indications of petitioner's lengthy history of organic brain damage, losses of consciousness and familial history.

1. Trial counsel discovered that Petitioner had been diagnosed with organic brain damage as a young child. Counsel did not investigate or discover the affect this condition had on Petitioner's behavior, home environment, school experiences, or other social interactions. As a result, critical defense theories for both guilt and penalty phase were overlooked.

2. One guilt defense theory was that Petitioner had been manipulated into this situation by Barrett and Eckstrom, who were more mentally sophisticated and adept at turning Petitioner's innocence and good will to their advantage. Had trial counsel investigated the facts of Petitioner's background, they would have discovered that once people became aware of Petitioner's reduced mental functioning, they often set him up and proverbially left him "holding the bag" for their own acts. Then Petitioner, in a misguided and false sense of self importance, untruthfully admitted to committing acts for which he bore no responsibility. Petitioner's confabulation was brought about because of his organic brain damage, his need to make up for periods of time during which he suffered losses of consciousness, and the lack of ability to exercise judgment concerning his best interests, due also to organic brain damage.

3. These facts and incidents, had they been presented would have assisted in establishing that the unfortunate death of VanZant was just another milepost in a long line of events in which Petitioner was wrongfully left "holding the bag" for Barrett and Eckstrom, among others. If the jury had been provided with this anecdotal evidence, and appropriate explanatory expert testimony, they would have acquitted Petitioner of capital murder and likely would have found him not guilty of all charges.

4. While they were detained pending trial, petitioner wrote a letter to Avette Barrett which contained statements the prosecution contended were inculpatory. The letter was admitted at trial.

5. The letter contained inculpatory statements which were confabulatory and the direct result of Petitioner's mental illness. Had trial counsel sought expert advice and

assistance concerning this letter, they would have learned the letter was an unreliable piece of evidence and could have sought to exclude it on that basis. Alternatively, a defense mental health expert could have explained the letter to the jury in a manner which undermined its inculpatory value and could have tied this communication to the overall theme that Petitioner often took responsibility for acts not of his own doing, due to his longstanding organic brain damage.

6. Trial counsel's failure to investigate or present additional evidence at guilt phase deprived petitioner of evidence that would have supported a defense premised on petitioner's less culpable mental state and/or non-participation in the capital crime. Trial counsel had no tactical reason for failing to investigate this evidence, and no tactical decision to forgo the presentation of available defenses was possible in the absence of investigation and expert assistance. It is reasonably probable that investigation and presentation of available evidence would have resulted in an outcome more favorable to petitioner at the guilt phase of his trial.

H. Counsel failed unreasonably to adequately investigate petitioner's competency to stand trial and to aid and assist in his defense at trial and on appeal. Counsel at trial failed unreasonably to seek a hearing on petitioner's competency to stand trial.

I. Trial counsel failed to investigate the effect of petitioner's drug use on his mental state at the time of the alleged homicide.

J. Attorney Shattuck's failing health materially interfered with his ability zealously to defend petitioner.

1. Attorney Shattack suffered a heart attack during the trial of the case.

2. Attorney Shattuck also had hearing difficulties which impaired his ability to prepare and present petitioner's case. (RT 4977.)

K. Trial counsel did not investigate the constitutional validity of petitioner's prior convictions and nonetheless stipulated to their admissibility. Petitioner was substantially harmed by the failure to uncover the unconstitutional nature of the convictions with which he was impeached during his guilt phase testimony and when they were introduced in aggravation of penalty.

L. Trial counsel failed to object to the admissibility of excludable evidence, to seek the admission of favorable

evidence, to consult with necessary and appropriate experts, and to formulate and submit appropriate instructions at both phases of trial.

M. Trial counsel's failure to investigate or present additional available mental state and other mitigation evidence at penalty phase deprived petitioner of mitigating evidence that would have provided the jury with strong mitigating factors on which to base a life verdict. Trial counsel had no tactical reason for failing to investigate this evidence, and no tactical decision to forgo its presentation was possible in the absence of investigation and expert assistance. It is reasonably probable that investigation and presentation of additional available evidence would have resulted in an outcome more favorable to petitioner at the penalty phase of his trial.

N. Trial counsel was ineffective for failing to uncover and challenge the conflicts of interest suffered by the Sierra County District Attorney's Office, which gave immunity to Barrett and Eckstrom, and to seek its removal as the prosecuting agency.

O. Trial counsel failed to investigate the capital charging policies of the Sierra County District Attorney's Office and to discover that those policies were arbitrary and capricious and violated state and federal constitutional standards. Had they done so, petitioner would not have been capitally charged.

P. Appellate counsel's failure to investigate and present this evidence was the result of prejudicial ineffective assistance, without justification.

XV.
PETITIONER'S INCOMPETENCE TO ASSIST COUNSEL.

Petitioner's convictions, death sentence, confinement are illegal, unconstitutional, and void under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26 to the United States Constitution because petitioner was tried and had his automatic appeal decided while incompetent to aid rationally and assist in his defense. Petitioner was additionally mentally incompetent to knowingly, intelligently, and voluntarily waive his various constitutional rights. In addition, the trial court's failure to declare sua sponte a doubt as to petitioner's competency to proceed, as well as trial counsel's

failure to bring the matter to the trial court's attention, . further deprived petitioner of his procedural due process rights, and his right to effective assistance of counsel.

Petitioner alleges the following facts in support of this claim, among others to be developed after full investigation, discovery, adequate funding for investigation and experts, and an evidentiary hearing on the merits of the claim:

A. Petitioner suffers a variety of mental and physical illnesses that significantly impair his mental functioning. He has a long history of depression, frequent and severe headaches, interruptions of consciousness, and organic brain damage.

B. During Petitioner's interrogation at the time of his arrest, he exhibited signs of these emotional disturbances. He was unable to validly waive his Miranda rights due to his pre-existing mental illness.

C. Petitioner requested treatment and medication for physical problems during pre-trial and trial proceedings. His physical discomfort diverted his attention and energy from his pre-trial and trial proceedings as he sought relief from the physical weakness, irritability, and pain that accompanied his physical problems.

D. Petitioner's colloquies with the court, in conjunction with other factors, raise substantial doubts as to his ability at that time to understand rationally and factually the proceedings surrounding his trial and his ability to aid and assist counsel in developing a defense. His behavior at trial was inappropriate a times.

E. Petitioner's preexisting mental and physical disabilities, coupled with events that occurred after his arrest, left him unable to understand factually and rationally the proceedings against him and to aid and assist his counsel. Petitioner was unable to focus and maintain his attention of preparing and presenting a defense to the charges against him. He was easily distracted by insignificant detail and preoccupation with his mental disturbances. His memory impairments, learning disabilities, and neurologic deficits left him unable to keep pace with courtroom proceedings. He was unable to hold in check his impulses and emotions during stages in the proceedings. Petitioner could not mentally attend to the events in courtroom proceedings, assist in the development of strategy, or make rational decisions about his defense. These problems continued on appeal.

F. The trial court abused its discretion in failing to make

further inquiries, to declare a doubt as to Petitioner's competence sua sponte pursuant to Penal Code section 1368, to suspend criminal proceedings, and to order evaluation of Petitioner's competence by mental health professionals. Petitioner was prejudiced by the failure to declare a doubt.

G. Petitioner's attorneys knew or should have known of petitioner's incompetence and failed unreasonably to investigate this issue and to seek a hearing thereon.

H. Litigation of petitioner's trial and appeal while incompetent constitutes reversible per se error.

XVI.
CUMULATIVE ERRORS AT BOTH PHASES OF TRIAL REQUIRE REVERSAL.

The errors at guilt phase, individually and in combination, so undermined the reliability of the guilt phase of the trial as to require that a new guilt trial be held, pursuant to the guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26.

The errors at penalty phase, individually and in combination, so undermined the reliability of the penalty phase of the trial as to require that a new penalty trial be held, pursuant to the guarantees of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the California Constitution, Article 1, §7, 13, 14, 15, 16, 17, 24, 25, 26.

XVII.
THE TRIAL JUDGE COMMITTED CONSTITUTIONAL ERROR WHEN IT RESPONDED TO A JURY INQUIRY WITH A LEGALLY INCORRECT RESPONSE AND PERMITTED THE JURY TO DECIDE PETITIONER'S SENTENCE BASED ON FALSE INFORMATION.

Petitioner's sentence of death was unlawfully imposed in violation of the Fifth, Sixth, Eight and Fourteenth Amendments when (1) the trial court gave the jury an instruction with constitutionally erroneous language; (2) the trial court forced revelation of the numerical split between the jurors; and, (3) he

fundamentally misled the jurors about their sentencing decision by failing to properly respond to a jury inquiry.

Petitioner alleges the following facts, among others to be added following further investigation, discovery and evidentiary hearing, in support of this claim:

A. The jury returned to court during penalty deliberations and asked the following questions:

> "In the event this jury cannot decide 100% on the penalty phase of the case, what would be the sentence imposed?" (RT 5347.)

B. The judge responded by asking for the jury's numerical division and was told it was split 10-2. The judge then asked the foreman if the jury might be able to reach a verdict. The foreman told the court that he thought there was a possibility. Then the judge told the jurors:

> "I'm going to let you do that. The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question."

C. The jury also asked the court to explain one of the typed instructions it had been given. (RT 5347-48.) The improperly drafted instruction given to the jury stated:

> "If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of the doubt and return a verdict fixing the penalty of life with [emphasis added] parole."

D. In response to the request for clarification, the trial judge told the jurors the written instruction was "self-explanatory" and that he hoped the jury would now be able to make a decision. (RT 5347-48.)

E. The errors related to the jury questions render the penalty trial completely unreliable. The trial judge exacerbated this constitutional misstep by refusing to respond to the jurors' concern about re-trial in the event of a hung jury. The failure to respond to the jurors' concerns interjected irrelevant and prejudicial considerations into the sentencing process, particularly where the judge did not admonish the jurors to refrain from considering what would occur if they did not agree on a verdict.

F. The jurors' second question appears to have been the real concern and it seems integrally related to the first question. Their instructions told them that petitioner could receive a sentence of life with parole. The jury which sentenced this petitioner to death was completely, fundamentally and unconstitutionally mislead about its sentencing choice. The jury had isolated and specifically identified the instruction which provided that purported sentencing option. They brought it to the court's attention. They were told that specific instruction was "self-explanatory" -- in other words, the life with parole was an option. Then, having armed the jury with constitutionally incorrect information, the judge advised he hoped the jury could reach a verdict.

G. These errors, singly and in combination, violated every requirement of reliability in capital sentencing procedures. The jury was given a constitutionally erroneous instruction and received false information about its sentencing choices. The trial judge's errors deprived petitioner of his right to the individual vote of each juror and to a fair penalty decision uninfluenced by prejudicial, constitutionally irrelevant and legally correct information.

H. These errors violated petitioner's right to a fair and impartial jury, to a reliable penalty decision which was not arbitrary or capricious, to equal protection, and due process of law in a fundamentally fair trial. Because the jury instructions at issue here went to the heart of the jury's sentencing decision, the error is reversible her se.

XVIII.
THE TRIAL JUDGE IMPROPERLY DENIED PETITIONER'S AUTOMATIC MOTION FOR MODIFICATION OF PENALTY.

Petitioner's death sentence was unlawfully imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial judge improperly denied petitioner's automatic motion to modify the death verdict.

Petitioner alleges the following facts, among others to be added following further investigation, discovery and evidentiary hearing, in support of this claim:

A. At the hearing on petitioner's motion to modify sentence, the trial judge considered the absence of certain statutory factors to constitute aggravation.

B. The trial judge improperly utilized evidence to impermissibly inflate aggravating factors.

C. The trial court did not consider mitigating evidence regarding petitioner's mental state and his domination by Avette Barrett and Allison Eckstrom.

D. The trial court failed to exercise independent discretion in deciding the motion to modify the penalty judgment.

E. The trial court's errors precluded consideration of mitigating evidence, skewed the weighing process in favor of aggravation, prevented the judge from affording petitioner individualized consideration in sentencing, and violated his state law statutory right to a judicial reweighing of the penalty phase evidence.

F. It is reasonably likely that a result more favorable to petitioner would have occurred in the absence of this error.

DATED: s/ Nov. 30, 1995

Respectfully submitted,

s/Marianne D. Bachers
MARIANNE D. BACHERS
Attorney for Petitioner

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before it, to the end that he might be discharged from his unconstitutional confinement and restraint, and/or relieved of his unconstitutional sentence of death;

2. Order Respondent to Answer this Petition by specifically admitting or denying each allegation and claim made herein;

3. Issue an order to show cause and order an evidentiary hearing at which proof may be offered concerning the allegations in this petition or any affirmative defenses presented by Respondents;

4. Permit petitioner, who is indigent, to proceed without prepayment of costs and fees, and grant him authority to obtain investigative and expert assistance, subpoenas without fees for witnesses and documents necessary to prove the facts alleged in this petition;

5. Require the Respondents to bring forth the entire state court record so that this Court can review those parts of the record that are relevant to the issues and defenses raised in this proceeding;

6. Stay petitioner's execution pending final disposition of this petition; and, grant such other and further relief as may be appropriate and necessary to dispose of the matter as justice may require.

Dated this 30th of November, 1995, at San Francisco, California.

s/ Marianne D. Bachers
MARIANNE D. BACHERS
Attorney for Petitioner

VERIFICATION

I, MARIANNE D. BACHERS, declare under penalty of perjury:

That I am an attorney admitted to practice before the courts of the State of California. My office address is: 900 North Point Street, Suite 220, San Francisco, California, 94109.

I am authorized by petitioner to file this Petition for Writ of Habeas Corpus on his behalf. Petitioner is confined and restrained of his liberty at San Quentin Prison, Tamal, California. I make this verification on petitioner's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a county different from my law office. I make the factual allegations contained herein based upon information and the good faith belief in the accuracy of the allegations.

Executed this 30th day of November, 1995, at San Francisco, California.

s/ Marianne D. Bachers
MARIANNE D. BACHERS

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

In re BRUCE WAYNE MORRIS,)	No.
)	[Related to
Petitioner,)	People v. Morris,
)	
On Habeas Corpus.)	No SO04781]
)	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

MARIANNE D. BACHERS
Attorney At Law
900 North Point Street
Suite 220
San Francisco, CA 94109

Attorney for Petitioner
BRUCE WAYNE MORRIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

A. The Claims Related to Barrett, Eckstrom and Petitioner 1

Facts 1

B. Prior Convictions Were Improperly Admitted 5

C. The Failure to Disclose Information Concerning Jailhouse Informants 8

D. Petitioner's Statements to Law Enforcement Authorities Were Improperly Admitted 9

E. Prejudicial Evidence Was Admitted After It Had Been Ordered Excluded 11

F. Insufficient Evidence of Murder 12

G. The Jurors Were Not Instructed That They Must Determine If Petitioner Premeditated and Deliberated the Homicide 12

H. Failure to Sequester 13

I. Invalid Priors at Penalty Phase 13

J. The California Capital Statute is Unconstitutional 14

K. Ineffective Assistance of Trial and Appellate Counsel 15

L. Petitioner's Incompetence 19

M. Cumulative Errors Require Reversal 19

N. False Information at Sentencing 20

O. Improper Denial of Petitioner's Motion to Modify 20

TABLE OF AUTHORITIES

CASES

Alcorta v. Texas (1957)355 U.S. 28 3

Bacigalupo v. California (1992) 113 S.Ct. 32 14

Bagley v. Lumpkin (9th Cir. 1986) 798 F.2d 1297 9

Bayramoglu v. Estelle (9th Cir. 1986) 806 F.2d 880 13

Brady v. Maryland (1963) 373 U.S. 83 3

Bryan v. Warden, Indiana State Reformatory
(7th Cir. 1987) 820 F.2d 217 11

Bundy v. Wainwright (11th Cir. 1988) 850 F.2d 424 3

Carlos v. Superior Court (1983) 35 Cal.3d 131 12

Chavez v. United States (9th Cir. 1981) 656 F.2d 512 ... 10

Code v. Montgomery (11th Cir. 1986) 700 F.2d 1481 ... 16

Colorado v. Connelly (1986) 479 U.S. 157 10

Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284 19

Crane v. Kentucky (1986) 476 U.S. 683 10

Cunningham v. Zant (11th Cir. 1991) 928 F.2d 1006 18

Drope v. Missouri (1975) 420 U.S. 162 19

Dunn v. United States (1979) 442 U.S. 100 11

Enmund v. Florida (1982) 458 U.S. 782 12

Evitts v. Lucey (1985) 469 U.S. 387 18

Furman v. Georgia (1972) 408 U.S. 238 14

Hendricks v. Calderon (9th Cir. 1995) 64 F.3d 1340 18

In re Clark (1992) 5 Cal.4th 750 18

In re Hall (1981) 30 Cal.3d 408 15

In re Jackson (1992) 3 Cal.4th 578 9

In re Sixto (1989) 48 Cal.3d 1247 18

Irvin v. Down (1961) 366 U.S. 717 13

Jackson v. Virginia (1979) 443 U.S. 307 12

Jamal v. VanDeCamp (9th Cir. 1991) 926 F.2d 918 11

Johnson v. Mississippi (1988) 486 U.S. 578 8

Kyles v. Whitley (1995) 514 U.S. __, 115 S.Ct. 1555 3

Lankford v. Idaho (1991) 500 U.S. __, S.Ct. 1723 14

Lincoln v. Sunn (9th Cir. 1987) 807 F.2d 805 19

Maynard v. Cartwright (1988) 486 U.S. 356 14

Mikes v. Borg (9th Cir. 1991) 947 F.2d 353 12

Napue v. Illinois (1959) 360 U.S. 264 4

Nixon v. Newsome (11th Cir. 1989) 888 F.2d. 112 16

Pate v. Robinson (1966) 383 U.S. 375 18

People v. Amaya (1986) 180 Cal.App.3d 1 8

People v. Coleman (1969) 71 Cal.2d 1159 8

People v. Hayes (1989)49 Cal.3d 1260 3

People v. Laudermik (1989) 67 Cal.2d 272 19

People v. Morris (1991) 53 Cal.3d 152 11

People v. Mozingo (1983) Cal.3d 926 18

People v. Plager (1987) 196 Cal.App.3d 1537 7

People v. Rodriguez (1986) 42 Cal.3d 703 20

People v. Shirley (1982) 31 Cal.3d 18 3

People v. Smith (1986) 187 Cal.App.3d 666 13

Simmons v. South Carolina (1994)
512 U.S. __, 114 S.Ct. 2187 20

Sims v. Livesay (6th Cir. 1992) 970 F.2d 1575 18
Sochor v. Florida (1992) 504 U.S. __, 112 S.Ct. 2114 ... 20

Stringer v. Black (1992)503 U.S. __, 112 S.Ct. 1130 14

Summit v. Blackburn (5th Cir. 1986) 795 F.2d 1237 12

Terry v. Rees (6th Cir. 1993) 985 F.2d 283 18

Tuggle v. Netherland (1995) __ U.S. __, 116 S.Ct. 283 .. 13

United States v. Agurs (1976) U.S. 97 4

United States v. Ferris (9th Cir. 1983) 719 F.2d 1405 12

United States v. Mastelotto (9th Cir. 1983)
717 F.2d 1238 12

United States v. Roberts (9th Cir. 1980) 618 F.2d 530 2

United States v. Shaw (9th Cir. 1987) 812 F.2d 1182 2

United States v. Young (9th Cir. 1994) 17 F.3d 201 5

Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312 18

STATUTES

PENAL CODE

Section 190.3 14

Section 190.4(e) 20

Section 207 6

Section 220 6

Section 261 6

Section 664 6

Section 667.5(b) 6

VEHICLE CODE

Section 10851 6

I.

INTRODUCTION

Petitioner presents eighteen claims in his habeas corpus petition. It is apparent from a review of these claims, and the facts upon which they are based, that the guilt and penalty phase proceedings at Petitioner's trial produced an inaccurate, incomplete and fundamentally false and unfair profile of petitioner and the evidence which was used to prosecute him.

A. The Claims Relate to Barrett, Eckstrom and Petitioner.

[Related to Claim I: Avette Barrett's Testimony Was Improperly Admitted Because It Was Impermissibly Coerced and Was False; Claim II: Allison Eckstrom's Testimony Was Improperly Admitted Because It was Impermissibly Coerced and Was False]

Facts

The main evidence at the guilt phase concerned whether it was petitioner, rather than prosecution witnesses Avette Barrett and Allison Eckstrom, who killed Ricky VanZant. VanZant had picked up the three hitchhikers near Lake Tahoe and had gone fishing and camping with them. Petitioner testified at trial that Barrett and Eckstrom killed VanZant after he committed a sexual assault against one of them. Petitioner had been away from the campsite when this episode occurred. He returned to find Eckstrom and Barrett covered with blood. All three assisted in moving VanZant – who they believed to be alive – outside, and in the cleaning up his van. (RT 4953-4603.) They drove to the midwest, where they were eventually arrested after divulging information about VanZant's death to a hitchhiker they picked up.

Claims I and II argue that Petitioner's conviction is unconstitutional because the pleas agreements used by the prosecution to obtain the testimony of Barrett and Eckstrom were legally objectionable because they amounted to witness vouching. Furthermore, the plea agreements encouraged and allowed Barrett and Eckstrom to give false and perjurious testimony against Petitioner without fear of legal retribution.

The use of plea agreements which impliedly endorse the

truth-telling abilities of a witness are improper. (United States v. Roberts (9th Cir. 1980) 618 F.2d 530, 532.) The perniciousness of witness vouching is that such arguments, and provisions in plea agreements, suggest to jurors that prosecutors have a special way (undisclosed to the jury) of determining whether a witness is in fact telling the truth. Roberts explained the problem in this manner:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor knows what the truth is and is assuring its revelation. (Id., 618 F.2d at p. 536.)

The truthfulness provisions of the plea agreements were discussed in the prosecutor's guilt phase opening statement. (RT 3130.) This constitutes improper vouching as well. (United States v. Shaw (9th Cir. 1987) 812 F.2d 1182, 1185.)

Eckstrom's plea agreement provision that she tell the truth "or else" was introduced at the outset of here direct testimony. (RT 3788.) She said that she would be "charged with everything" if she lied, but if not, she would get full immunity.

Barrett's truth telling plea agreement provision was likewise introduced at the beginning of her direct examination. (RT 4001.)

Amazingly, during his closing argument, the prosecutor acknowledged that Barrett and Eckstrom had not told the truth during some parts of their testimony. (RT 4794-98.)[1/] He also told the jurors that there were parts of Barrett's and Eckstrom's testimony which was consistent – that Petitioner killed VanZant, not them. (RT 4794, 4796.) The prosecutor struggled mightily to justify all the other contradictory statements made by Barrett and Eckstrom post-arrest, at the preliminary examination and at trial. He ascribed the inconsistencies to lack of memory, youth, fright[2/], etc., but never to the obvious

---

1. Of course, the prosecutor had a constitutional obligation to correct false testimony. (Alcorta v. Texas (1957) 355 U.S. 28.)

2. Eckstrom testified that her memory had gotten better because of "dreams". (RT 3948-49.) This comment suggests that Eckstrom may have been treated by a mental health professional who hypnotically refreshed her

explanation: perjury. what all of this amounted to was the exact vice Roberts and its progeny condemn: putting the prestige of the prosecutorial office behind the district attorney's interpretation of what constituted the "truth". The plea agreements and the prosecutor's argument gave Barrett and Eckstrom undeserved, enhanced credibility and precluded the jurors from fairly evaluating their truth-telling capabilities.

Perhaps most egregious in this scenario is the prosecutor's admission that he "had some problems" (i.e., concerns about perjury) with Barrett's and Eckstrom's trial testimony.[3] But, the any fear the jury had about Barrett and Eckstrom's credibility was resolved by its knowledge that the witnesses would be prosecuted if the district attorney decided they were lying. That confidence was ill founded. Just what parts of Barrett's and Eckstrom's testimony gave the prosecutor pause? Prosecutor Rossi's abiding belief that naivete, youth, fear, bad dreams, lack of intelligence, or whatever cause Barrett and Eckstrom to "fudge" their testimony just goes to show that they could say anything they wanted with impunity and not suffer any consequences, contrary to what the plea agreement stated. As long as Barrett and Eckstrom testified consistently with the prosecution's view of the evidence (a contention advanced on direct appeal), they were home free.

"The jury's estimate of the truthfulness and reliability of

---

recollections. The use at trial of testimony which has been hypnotically refreshed is improper and unconstitutional. (People v. Hayes (1989) 49 Cal.3d 1260; People v. Shirley (1982) 31 Cal.3d 18; Bundy v. Wainwright (11th Cir. 1988) 850 F.2d 424, 428-29). The use of hypnosis to enhance the recollections of Barrett and/or Eckstrom, if utilized, requires the reversal of the guilt phase convictions. Such evidence was required to be disclosed by the prosecution. (Brady v. Maryland (1963) 373 U.S. 83; Kyles v. Whitley (1995) 514 U.S. 115 S.Ct. 1555).

3. The prosecutor stated, "As to the testimony of Miss Barrett and Miss Eckstrom, I think was very obvious that both girls were not totally honest with the officers during their multitude of out-of-court statements. I have some problems with some of their testimony in this courtroom.

. . . .

As to Eckstrom's statement, even though there were inconsistencies within the multitude of statements, there was, in my opinion [emphasis added], a common thread throughout her five or six statements as well as her testimony." (RT 4794.)

a given witness may well be determinative of guilt or innocence." (Napue v. Illinois (1959) 360 U.S. 264, 269). "A conviction obtained by the knwing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (United States v. Agurs (1976) 427 U.S. 97, 103; accord Kyles v. Whitley (1995) 514 U.S. ___, 115 S.Ct 1555, 1565, n. 7). Moreover, the assurances of a prosecutor that false evidence was presented in good faith is of little comfort to someone who has been wrongfully convicted thereupon. This requires reversal. (United States v. Young (9th Cir. 1994) 17 F.3d 201).

The evidentiary profile received by this jury about Barrett and Eckstrom, and the evidence they provided, was fundamentally flawed and erroneous. Any credibility determination concerning either witness was removed from jury consideration by the prosecution at every stage of the case: opening statement, direct examination testimony and closing argument. The jurors were told they did not have to investigate this evidentiary thicket because the prosecutor had gone in beforehand to ascertain that everything was all right.[4] The combination of the improper plea agreements, witness vouching and the presentation of perjury render the testimony of both witnesses constitutionally unreliable. The presentation of this evidence and argument deprived Petitioner of his right to have a jury determine every disputed issue in the case, to the individual vote of each juror, to present a defense, to a reliable verdict in both phases of his capital trial and to due process of law. Since Barrett and Eckstrom were the only other people at the crime scene, the unreliability of their testimony requires that Petitioner be given a new guilt and penalty trial.

B. Prior Convictions Were Properly Admitted.

[Related to Claim III: Prior Convictions Were

---

4. Additionally, trial counsel did not investigate and present impeaching evidence concerning Barrett or Eckstrom, although it was available. This aspect of the claim is discussed in connection with the allegation that trial and appellate counsel were ineffective.

Improperly Admitted.]

Petitioner's prior criminal history played a central role in this case. The Amended Information filed against Petitioner in San Joaquin County alleged two prior serious felonies: attempted rape and rape in violation of Penal Code §§ 664/261 and 220, on September 26, 1977, in Sacramento; and kidnapping in violation of Penal Code § 207, on February 5, 1980, in Butte County. A prior prison term was alleged pursuant to Penal Code § 667.5(b). This was an escape conviction on May 1, 1980, in San Luis Obispo County. (CT 1036-38).

The prosecution was permitted to impeach Petitioner with prior convictions when he testified. (RT 4627).

Prior convictions were admitted as aggravation at penalty phase, after trial counsel stipulated to them. (RT 4969).

The penalty phase strategy in this case was to establish that Petitioner had suffered from organic brain damage, possibly in utero, which Petitioner had show signs of as early as three years old. (RT 5155). Professional testing confirmed this diagnosis when Petitioner was about nine or ten years old. (RT 5135, 5148-49). The defense experts testified that Petitioner has been unable to think logically or rationally since childhood. (RT 5135). The experts testified the Petitioner's behavior has always been impulsive. He does not have the ability to organize his thoughts, figure out consequences of his actions, or to plan a course of action. (RT 5098).

Petitioner's lifelong organic brain damage and underlying mental impairments provided mental defenses to his prior criminal activity. His brain damage and impairments prevented him from having the ability to formulate specific intent, and precluded him from entering pleas of guilty or any other waiver asked of him in the prior cases.[5/] It prevented him from rationally consulting with his former counsel, and from making reasoned decisions about the course of the litigation in those cases. Prior attorneys did not investigate these matters, nor did

---

5. Petitioner's 1977 conviction for a violation of Vehicle Code § 10851 was obtained by guilty plea. Petitioner gave statements to law enforcement authorities in connection with the September, 1977, case, in which it was alleged he waived his Miranda rights. He also entered a plea of guilty to the September, 1977, offense.

Petitioner's capital case attorneys determine what affect Petitioner's extreme mental health problems had with respect to the validity of the prior convictions. Petitioner's own experts provided the investigative leads which suggested the infirmity of the prior convictions.

Defense counsel candidly admitted to the trial court that they did not investigate the prior convictions at all. (RT 3144, 4949.) Defense counsel has an obligation to undertake investigation into prior criminal convictions when the priors are relevant to a trial. (People v. Plager (1987) 196 Cal.App.3d 1537, 1541-45; 242 Cal.Rptr. 624, 626-28) [counsel's stipulation to a prior conviction in the absence of investigation into its validity is ineffective assistance, requiring reversal]. Here, counsels' stipulation to the priors was prejudicial because there were numerous bases upon which the constitutional legitimacy of the convictions should and could have been challenged and counsel undertook to investigate none of them. Petitioner's longterm mental disabilities, and the many ways in which the capital trial experts explained Petitioner's mental functioning was impaired, all strongly suggested that similar problems might have existed when Petitioner was prosecuted before.[6] These investigative clues were not exploited[7], and prior counsel was ineffective for not having adequately represented petitioner in connection with those cases. Capital case counsel should have investigated and moved to invalidate the priors on the basis of ineffective assistance of counsel. (People v. Coleman ((1969) 71 Cal.2d 1159; People v. Amaya (1986) 180 Cal.App.3d 1).[8]

---

6. In fact, the 1977 Penal Code § 207 offense bore striking similarity to the capital crime. It involved a girlfriend who Petitioner believed was or had been pregnant and an attempt to help her escape from a difficult family situation, jsut ad Barrett and Eckstrom claimed to be doing when they left their mother's home in Sacramento. The similarity of these offenses, when considered in light of Petitioner's mental health problems, cried out for further investigation and evaluation.

7. It is very possible that other constitutional problems affect the prior convictions which are unrelated to mental health issues, but counsel is unable to plead them in the absence of investigative and expert assistance.

8. The invalidity and unreliability of the prior convictions also rendered them inadmissible as aggravation at penalty phase. (Johnson v.

Petitioner's prior convictions are the result of: (1) unknowingly and invalidly entered pleas of guilty, (2) admissions of guilt made when Petitioner was unable to validly or intelligently waive his Miranda rights, and (3) proceedings which occurred while Petitioner was unable to rationally assist counsel. Thus, the prior convictions are invalid. Capital case counsel stipulated to the admissibility of these offenses without any investigation. Like Plager, the admission of this unconstitutional evidence against Petitioner at both phases of his trial requires that the guilt and penalty verdicts be set aside.

C. The Failure to Disclose Information Concerning Jailhouse Informants.

[Related to Claim IV: Failure to Disclose Information Concerning Jailhouse Informants]

Anthony Brooks testified that Petitioner discussed the possibility of escape with him. (RT 4160-62). Charles Wharton, a fellow Sierra County jail inmate, also testified. He stated that Petitioner made statements admitting having killed VanZant. (RT 3814-15). Wharton testified that he received no benefits in exchange for their cooperation. (RT 3823). Brooks served only a portion of his sentence. (RT 4160-61). The defense requested all impeaching or exculpatory information concerning the prosecution witnesses. (CT 27-40; Motion for Pre-trial Discovery, Requests # 10 & 16).

It appears however that Brooks and Wharton did receive benefits for their testimony – early release. These were benefits which were required to be disclosed. (In re Jackson (1992) 3 Cal.4th 578, 595; 11 Cal.Rptr. 531, 540; Bagley v. Lumpkin (9th Cir. 1986) 798 F.2d 1297). The failure to disclose this evidence requires reversal of the convictions and death sentence.

D. Petitioner's Statements to law Enforcement Authorities Were Improperly Admitted.

[Related to Claim V: Improper Admission of Petitioner's Statements to Law Enforcement Authorities]

Petitioner made multiple statements to law enforcement

Mississippi (1988) U.S. 578).

authorities when he was arrested in Nebraska. These statements should not have been admitted against him at trial because Petitioner was unable to validly waive his rights to silence or to counsel, due to his organic brain damage and underlying mental impairments. Additionally, the statements should not have been admitted because they were confabulated and the product of Petitioner's mental impairments.

Testimony at the penalty trial established that Petitioner had been suffering from organic brain damage and underlying mental disabilities, perhaps since he was born. (RT 5155). These mental conditions prevented him from being able to meaningfully understand and rationally process information on an every day basis. (RT 5155-57). He was and is unable to organize his thoughts, engage in rational decision-making processes, and understand the consequences of his actions. (RT 5098-5100). Petitioner's ability to see far enough ahead to evaluate the consequences of his actions is impaired. As a result, he acts impulsively, without meaningful consideration. (RT 5103).

Additionally, the Nebraska authorities engaged in coercive practices which were designed to elicit the confession. The authorities delayed Petitioner's arraignment and then permitted Petitioner to speak with Barrett in an attempt to induce cooperation. (RT 163-76). The circumstances, and Petitioner's impaired mental state, combined to render his Miranda waiver were invalid. (Colorado v. Connelly (1986) 479 U.S. 157, 167; Chavez v. United States (9th Cir. 1981) 656 F.2d 512).

Additionally, trial counsel was ineffective for failing to present expert testimony concerning the manner in which Petitioner's statement was taken and providing an explanatin for why Petitioner would confess to a crime for which he bore no responsibility. (Crane v. Kentucky (1986) 476 U.S. 683). It was the defense contention that Petitioner falsely confessed to the VanZant homicide out of a desire to shield Barrett and Eckstrom from prosecution. Petitioner testified at the guilt phase. His testimony was an unmitigated disaster. The prosecutor was able to elicit testimony from Petitioner over and over again that he had lied when he spoke to Nebraska authorities. The unmistakable impact of this line of questioning was that Petitioner was a liar, then and now. The defense could and should have found another way to confront this problem. Crane v. Kentucky provided it. A mental health expert would have explained that Petitioner confabulated his unreliable

Nebraska statements, and was the direct result of long standing mental impairments. The defense needed another way to explain why Petitioner might falsely confess rather than just having him deny it on the stand. It is mystifying why counsel, knowing of Petitioner's mental impairments, would place the burden of persuasion for this critical guilt phase issue on their client's shoulders. There was no reasonable, informed tactical justification for such a strategy.

Because Petitioner's statements were improperly entered against him at trial, and because Petitioner was denied his right to present witnesses in aid of a complete guilt phase defense, (Crane v. Kentucky, 476 U.S. at p. 690), the guilt judgment should be vacated.

E. Prejudicial Evidence Was Admitted After It Had Been Ordered Excluded.

[Related to Claim VI: Prejudicial Evidence that the Trial Court Had Excluded Was Admitted at Trial in Violation of Petitioner's Due Process Rights].

In his statement to Nebraska authorities, Petitioner stated that he had left Sacramento because he was in trouble with underground people who were going to kill him. The evidence was ordered deleted but the prosecutor questioned Petitioner about the statement. (RT 4682-85).

The prosecutor also cross-examined Petitioner about his statement to authorities taht he wouldn't "cop to nothing I ain't done", which had also been excluded as prejudicial. (RT 4682-83).

When the California Supreme Court reviewed this case on direct appeal, it formulated new theories of admissibility upon which these items of evidence could have been admitted at trial, rather than excluded. (People v. Morris (1991) 53 Cal.3d 152, 203-04). By formulating new theories of admissibility for the evidence, the Supreme Court violated appellate due process. (Dunn v. United States (1979) 442 U.S. 100, 107; Jamal v. Van DeKamp (9th Cir. 1991) F.2d 918, 919; Bryan v. Warden, Indiana State Reformatory (7th Cir. 1987) 820 F.2d 217). Articulating a new theory of admissibility changed the rules under which the case was tried below and allowed the appellate court to avoid reaching the issues as presented to the trial court. This error requires reversal of the judgments.

F. Insufficient Evidence of Murder.
[Related to Claim VII: The Evidence Was Insufficient for Conviction of Murder].

Petitioner's contends that the testimony of Barrett and Eckstrom was perjurious and therefore inadmissible on the issue of whether Petitioner killed VanZant.[9] Where there is insufficient admissible evidence to support a jury verdict, due process is violated. (Mikes v. Borg (9th Cir. 1991) 947 F.2d 353; Summit v. Blackburn (5th Cir. 1986) 795 F.2d 1237, 1244; Jackson v. Virginia (1979) 443 U.S. 307).

G. The Jurors Were Not Instructed That They Must Determine If Petitioner Premeditated and Deliberated the Homicide.
[Related to Claim VIII: Petitioner was deprived of his right to a unanimous jury determination on whether he premeditated and deliberated the homicide].

Petitioner contends that the trial court was required to instruct the jury that it must find premeditation and deliberation in order to find petitioner guilty of first degree murder. No such instruction was given.

A defendant is entitled to have each individual juror decide every disputed fact in the case. (United States v. Ferris (9th Cir. 1983) 719 F.2d 1045, 1407; United States v. Mastelotto (9th Cir. 1983) 717 F.2d 1238, 1248-51). The constitution requires such an instruction. (Emmund v. Florida (1982) 458 U.S. 782).

H. Failure to Sequester.
[Related to Claim IX: The Failure to Sequester the Jury Was Prejudicial Error].

During trial, significant criminal cases were subject to comment in the local press. (RT 4965). The trial judge was concerned enough about the articles to comment upon them. If

---

9. In any event, Barrett testified that Petitioner did not intend to kill VanZant. (RT 4078, 4082), a requirement under th law at the time the crime occurred. (Carlos v. Superior Court (1983) 35 Cal.3d 131). Thus, their testimony established that the evidence was insufficient for capital murder.

this press coverage influenced the jury, petitioner was deprived of his right to a fair trial. (Irvin v. Down (1961) 366 U.S. 717; Bayramoglu v. Estelle (9th Cir. 1986) 806 F.2d 880, 887, 888). Additionally, if the press coverage was pervasive, a hearing into sequestration should have been ordered.

I. Invalid Priors at Penalty Phase.[10]

[Related to Claim X: Admission of Evidence Concerning the Facts Underlying Petitioner's Prior Convictions Was Unlawful; and Claim XI: Admission of Aggravation Without Pre-Trial Notice of the Defense].

The aggravating evidence admitted at penalty phase was Petitioner's abstracts of Petitioner's convictions for kidnapping, attempted rape and assault with intent to commit rape in Sacramento in 1978, and for kidnapping in Butte County in 1980. (RT 4969). Testimony was presented from a police officer who investigated the 1980 kidnapping. (RT 4970-93).

Petitioner waived his right to trial on the priors. (RT 4938-39). The waiver is invalid. It does not mention the right to confront witnesses, to call witnesses in his own behalf, or to present a defense to the priors. (People v. Smith (1986) 187 Cal.App.3d 666, 684). This was the law when Petitioner was tried.

Additionally, the prosecutor failed to give the required pre-trial notice concerning evidence to be used in aggravation. Trial counsel objected. (RT 4948-49). This was reversible error. (Penal Code § 190.3; Lankford v. Idaho (1991) 500 U.S. ___, 111 S.Ct. 1723).

The introduction of evidence concerning Petitioner's prior convictions was unconstitutional, and requires reversal of the penalty judgment, for all of the reasons stated here, in Section B, above, and for all the reasons stated in the habeas corpus petition.

---

10. Petitioner incorporates the arguments made above in Section B, concering the invalidity of the priors in this section as well. Where aggravating evidence is found to be inaccurate or inadmissible, the penalty judgment must be set aside. (Tuggle v. Netherland (1995) ___ U.S. ___, 116 S.Ct. 283).

J. The California Capital Statute is Unconstitutional
[Related to Claim XII: The California Statute is Overly Broad and Void for Vagueness; and Claim XIII: The Trial Court Failed to Delete Unnecessary Factors from Jury Consideration at Penalty Phase].

The California statute, and the instructions Petitioner's penalty jury received about aggravating evidence, is constitutionally overbroad and vague in violation of Stringer v. Black (1992) 503 U.S. ___, 112 S.Ct. 1130; Bacigalupo v. California (1992) 113 S.Ct. 32, and Maynard v. Cartwright (1988) 486 U.S. 356, because Factors A, B, and C, all duplicate findings made at guilt phase. The statute is also unconstitutional because the use of felony-murder as an aggravating factor where it is also a factor for determining death eligibility. This procedure does not adequately narrow the class of murderers eligible for the death penalty. (Furman v. Georgia (1972) 408 U.S. 238).

The California statutes failure to specify which factors are aggravating and mitigating, and trial court's failure to delete inapplicable factors from jury consideration at penalty phase, renders Petitioner's death sentence unconstitutional because the jury was not provided with guidance about how to evaluate the penalty phase evidence. (Maynard v. Cartwright, supra; Stringer v. Black, supra).

K. Ineffective Assistance of Trial and Appellate Counsel.
[Related to Claim XIV: Ineffective Assistance of Trial and Appellate Counsel].

The habeas corpus petition sets out at length the prejudicial errors and omissions of Petitioner's prior counsel in this case. The guilt phase defense was that Barrett and Eckstrom committed the homicide of VanZant after VanZant sexually assaulted Barrett, and that Petitioner came upon the scene after the homicide occurred. There were several ways to prove this defense, but investigative leads were not pursued by defense counsel.

Barrett and Eckstrom were the central witnesses against Petitioner at guilt phase. Trial counsel failed to conduct a thorough background investigation into Barrett and Eckstrom. Counsel did obtain some juvenile court records of Eckstrom's,

and some witnesses who had been in jail with Barrett testified, but that was the extent of the investigation. Anecdotal evidence from friends and acquaintances who had known Barrett and Eckstrom fro a significant period of time suggests that Barrett and Eckstrom were liars and thieves, themes central to the defense effort to cast blame for th crime upon them. No effort was made to bring forth witnesses to such behavior by the main prosecution witnesses. Thus, their perjurious testimony essentially went unchallenged and critical evidence went unpresented on Petitioner's behalf.

The failure to investigate and present impeaching evidence regarding critical defenses constitutes prejudicial ineffective assistance of counsel, without justification. (In re Hall (1981) 30 Cal.3d 408) [where counsel believes his/her client has been false accused of murder, there is a heightened duty to investigate the case, pursue reluctant witnesses, and redouble efforts to overcome unusual obstacles placed in the path of developing the truth, Id., at 434]; (Nixon v. Newsome (11th Cir. 1989) 888 F2d 112, 115-17) [failure to impeach star witness's testimony was prejudicial ineffectiveness]; (Code v. Montgomery 11th Cir. 1986) 700 F.2d 1481 [trial attorney ineffective where he failed to investigate alibi defense and case was reduced to swearing match between defendant and accomplices].

Trial counsel also conducted no investigation into Ricky VanZant, although evidence (see petition: VanZant's prior criminal record, his many tatoos, his physical condition suggestive of advanced alcoholism, heaving drinking on the day of the homicide, frequenting porn shops) suggested that such an inquiry would be fruitful. It was the defense contention that VanZant had been drinking heavily since he picked up the three hitchhikers, and that, as mentioned above, VanZant assaulted one of the girls, and the girls then killed him. It would have been critical for the defense to prove that VanZant had behaved this way in the past. Defense counsel in fact eschewed the investigation of anything having to do with VanZant's background, on a legally erroneous basis. (RT 130-31.) Substantial and compelling evidence which would have been helpful to the defense did exist, but went undiscovered and unpresented. The failure of counsel to uncover and marshal this evidence at part of petitioner's guilt phase defense was ineffective under In re Hall, supra.

The third guilt phase dilemma was Petitioner's Nebraska

statements, discussed above. In a misguided and ill conceived attempt to protect Barrett (whom he believed to be carrying his child)[11], and her sister Eckstrom, Petitioner falsely confessed to the homicide of VanZant to Nebraska authorities. Petitioner's act of bravado was sadly consistent with Petitioner's life long pattern of taking responsibility for acts he did not commit, often in the context of criminal cases. Petitioner's confabulations could have been tied to the organic brain damage trial counsel discovered, but no such investigation was conducted.

Petitioner testified at trial that he did not commit the homicide of VanZant. However, since trial counsel did nothing to explain why Petitioner confabulated when arrested, Petitioner was severely impeached. Had counsel consulted with and presented expert testimony about Petitioner's post-arrest statements, such as expert could have shown that Petitioner's statements (and the inculpatory jail house letter to Barrett) were the direct result of his organic brain damage and impaired mental functioning. Trial counsel's strategy to rely on Petitioner's testimony to prove Barrett and Eckstrom committed the homicide and that the post arrest statements were incorrect was a disaster. During cross examination, Petitioner was forced over and over again to say he had lied to Nebraska authorities, when in fact, given his mental disabilities, this characterization was forensically inaccurate. Trial counsel could and should have presented the testimony of an expert to explain why Petitioner would falsely confess. (Crane v. Kentucky, supra). The failure to do so was prejudicial ineffective assistance.

The prosecution pathologist's testimony was uncertain as to some aspects of the crime scene, facts which if independently tested and disputed could have assisted Petitioner. (RT 3481: potential dispute re: defensive wounds by victim, showing he was not surprised from behind as Barrett and Eckstrom testified; RT 3499-3500: possible dispute about time of death and VanZant's actions after being injured; RT 3508: possible dispute about injuries suffered after death; RT 3525-18: possible dispute about VanZant's state of inebriation). Petitioner had the right to hire an independent pathologist. (Terry v. Rees (6th Cir. 1993) 985 F.2d 283). Where counsel fails to adequately investigate the crime scene, there is

---

11. In fact, Barrett was not pregnant. She testified that she never told Petitioner she was pregnant.

ineffective assistance. (Sims v. Livesay (6th Cir. 1992) 970 F.2d 1575). The failure to have an independent pathologist conduct an examination, under the circumstances of this case, was prejudicial ineffective assistance.

Trial counsel failed to present the testimony of experts at the guilt phase to establish the Petitioner's mental impairments prevented him from entertaining the mental states required for murder in this case, despite the fact that such evidence existed. (RT 5101: penalty phase testimony that Petitioner unable to conform conduct to the requirements of law because of impaired brain functioning). Expert testimony could also have been used to show that Petitioner would not have instigated this type of activity but was easily made the unwitting dupe by others who were more sophisticated. (In re Sixto (1989) 48 Cal.3d 1247; People v. Mozingo (1983) 34 Cal.3d 926).

The failure of trial counsel to investigate and present additional evidence concerning Petitioner's background, upbringing and mental state, and to ensure the admissibility of evidence critical to the penalty phase (RT 5151, 5164), was prejudicial ineffectiveness. (Cunningham v. Zant (11th Cir. 1991) 928 F.2d 1006; Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312); Hendricks v. Calderon (9th Cir. 1995) 64 F.3d 1340).

Appellate counsel's failure to raise and litigate the issues contained herein on appeal or in the context of a state habeas corpus proceeding constitutes prejudicial ineffectiveness, without justification. (Pate v. Robinson (1966) 383 U.S. 375; (Evitts v. Lucey (1985) 469 U.S. 387; In re Clark (1992) 5 Cal.4th 750, 780) [appellate counsel's failure to provide adequate representation in earlier habeas corpus petition justifies need for second petition].

L. Petitioner's Incompetence.

[Related to Claim XV: Petitioner's Incompetence to Assist Counsel].

As discussed above, in Sections B and K, Petitioner has suffered from mental impairments since he was a child. Trial testimony by Petitioner's mental health experts established that there was a probability that Petitioner could not properly process the information he was receiving about the case and was unable to meaningfully assist his counsel as a result.

Additionally, trial counsel were in possession of information which supported this conclusion. Jail inmates and

jail personnel in Nevada County observed Petitioner talking to himself and answering himself, heard him hitting his cell walls with his hands and head, and hitting his head with his hands. All these facts suggest incompetence.

Prosecution of a case while Petitioner is incompetent violates due process, and the failure of trial and appellate counsel to initiate such proceedings amounts to prejudicial ineffectiveness. (Drope v. Missouri (1975) 420 U.S. 162; Pate v. Robinson (1966) 383 U.S. 375; People v. Laudermik (1967) 67 Cal.2d 272, 282).

M. Cumulative Errors Required Reversal
[Related to Claim XVI: Cumulative Errors at Both Phases of Trial Require Reversal].

The errors at guilt and penalty phase, alone and in combination, require reversal of the judgments. (Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284; Lincoln v. Sunn (9th Cir. 1987) 807 F.2d 805, 814, n.6) [state law errors which might not be so prejudicial as to violate due process may cumulatively produce constitutional error].

N. False Information at Sentencing.
[Related to Claim XVII: The Trial Judge Committed Constitutional Error When He Responded to a Jury Inquiry With A Legally Incorrect Response and Permitted the Jury to Decide Petitioner's Sentence Based on False Information].

The facts concerning this issue are set out at length in the petition, at pages 48-51. It is now evident that the judge's error in failing to respond to the jury questions and in permitting the jury to decide Petitioner's sentence when they erroneously believed he was eligible for parole, is fundamental constitutional error. (Simmons v. South Carolina (1994) 512 U.S. ___, 114 S.Ct. 2187, 2198) [where jury instruction erroneously informed jury defendant was parole eligible, due process was violated and reversal required].

O. Improper Denial of Petitioner's Motion to Modify
[Related to Claim XVIII: The Trial Judge Improperly Denied Petitioner's Automatic Motion for Modification of Penalty].

The trial judge's failure to consider mitigating evidence regarding petitioner's mental state, his domination by Barrett and Eckstrom, and his reliance on the unconstitutional priors, was improper. Had the court properly exercised its obligations under Penal Code § 190.4(e), Petitioner would have received a life sentence. (People v. Rodriguez (1986) 42 Cal.3d 703; Sochor v. Florida (1992) 504 U.S. __, 112 S.Ct. 2114).

For all the reasons contained in the attached petition and in these authorities, Petitioner's convictions and death sentence should be set aside, or an order to show cause should be issue to permit proof of the allegations contained herein.

DATED: Dec. 1, 1995

Respectfully submitted,

s/MARIANE D. BACHERS
MARIANNE D. BACHERS
Attorney for Petitioner

BRUCE WAYNE MORRIS

DECLARATION OF SERVICE BY MAIL

RE: In re Bruce Wayne Morris on Habeas Corpus
No.
[Related to People v. Morris, No. S004781]

I, Suzanne Ryan, declare that I am over 18 years of age and not a party to the within cause; my business address is 900 North Point Street, Suite 200, San Francisco, CA 94019. I served a true copy of the attached

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON UNDER SENTENCE OF DEATH; BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Ward Campbell
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Enclosed said envelope was then, on December 1, 1995, sealed and deposited in the United States Mail at San Francisco, California, the county of which I am employed, with the postage thereon fully prepaid for delivery as first class mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 1995, at San Francisco, California.

s/ Suzanne Ryan
Suzanne Ryan

SUPREME COURT
FILED - Dec 6 1995
Robert Wandruff, Clerk

S050354
IN THE SUPREME COURT
OF STATE OF CALIFORNIA

IN RE BRUCE WAYNE MORRIS
ON
HABEAS CORPUS

The petition for writ of habeas corpus, filed on December 1, 1995, is denied. All claims are based on information that was long known or should have been known to petitioner or his counsel and could have been raised in petitioner's earlier habeas corpus petition; petitioner fails to allege with particularity any fact not earlier known to petitioner. No sufficient justification has been offered to explain the delay or the successive petition, an no fundamental miscarriage of justice has been demonstrated to excuse either. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, std. 1.2; *In re Clark* (1993) 5 Cal.4th 750, 767-782 [successive petitions], 783-787 [delay], 797-798 [exceptions].) Accordingly, the petition is denied as untimely. It is also denied on the merits. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, fn.10.)

Petitioner's request for stay of execution pending our consideration of the petition for writ of habeas corpus and petitioner's request that we "[p]ermit petitioner, who is indigent, to proceed without prepayment of costs and fees, and grant him authority to obtain investigative and expert assistance, subpoenas without fees for witnesses and documents necessary to prove the facts alleged in this petition; [and] . . . [r]equire the Respondents to bring forth the entire state court record so that this court can review those parts of the record that are relevant to the issues and defenses raised in this proceeding" are denied as moot.

Chief Justice

MARIANNE D. BACHERS, ESQ. - State Bar No. 94743
900 North Point Street, Suite 220
San Francisco, CA 94109
Telephone: (415) 673-8000

TONY TAMBURELLO, ESQ. - State Bar No. 46037
TAMBURELLO, HANLON & WAGGENER
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 431-4500

Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS, Petitioner v. ARTHUR CALDERON, Warden, CALIFORNIA STATE PRISON AT SAN QUENTIN, Respondent.	No CIVS-92-0483 EJG GGH PETITIONER'S MOTION FOR DISCOVERY **DEATH PENALTY CASE**

Table Of Contents

Table of Authorities ii

I. DISCOVERY IS PERMITTED WHERE PETITIONER CAN DEMONSTRATE
GOOD CAUSE FOR THE INFORMATION HE SEEKS TO UNCOVER 3

II. ISSUES REQUIRING DISCOVERY 5

REQUEST FOR PRODUCTION OF DOCUMENTS 5

CONCLUSION 12

Table Of Authorities

CASES

Adamson v. Ricketts,
865 F.2d 1011, 1025 (9th Cir. 1988) 11

Barry v. United States,
528 F.2d 1094, 1101 (7th Cir. 1976) 4

Blackledge v. Allison,
431 U.S. 63, 82, fn. 25 (1977) 4

Brady v. Maryland,
373 U.S. 83 (1963) 7

Coleman v. Zant,
708 F.2d 541, 545 (11th Cir. 1983),
reversed on other grounds,
778 F.2d 1487 (11th Cir. 1985) 3

Dickson v. Wainwright,
683 F.2d 348, 352 (11th Cir. 1982) 4

East v. Scott,
55 F.3d 996, 1001-02 (5th Cir. 199) 7

Furman v. Georgia,
408 U.S. 238 (1972) 11

Harris v. Nelson,
394 U.S. 286 (1969) 3

Harris v. Pulley,
885 F.2d 1354, 1372 (9th Cir. 1988) 4

Kyles v. Whitley,
115 S.Ct. 1555 (1995) 8

McKenzie v. Risley,
915 F.2d 1396, 1398 (9th Cir. 1990) 4

McLester v. Smith,
802 F.2d 1330, 1334 (11th Cir. 1986) 4

Medina v. Singletary,
59 F.3d 1095 (11th Cir. 1995) 11

People v. Allen,
42 Cal.3d 1222, 1235 (1986) 17

People v. Shirley,
31 Cal.3d 18 (1982) 8

Ross v. Kemp,
785 F.2d 1467 (11th Cir. 1986) 4

Thomas v. Goldsmith,
979 F.2d 746, 749-50 (9th Cir. 1992) 4

United States v. Heldt,
668 F.2d 1238, 1277 (D.C. Cir. 1981),
cert. denied, 456 U.S. 926 (1982) 10

United States v. Lorenzo,
995 F.2d 1448, 1453 (9th Cir. 1993) 10

United States v. Tamura,
694 F.2d 591, 601 (9th Cir. 1982) 10

Woodson v. North Carolina,
428 U.S. 280, 303 (1976) 11

Young v. U.S. ex rel. Vuitton Et Fils SA,
481 U.S. 787 (1987) 10

RULES

Rule 6 of the Habeas Corpus Rules 2

Rule 6(a) of the Habeas Corpus Rules 3

MARIANNE D. BACHERS, ESQ. - State Bar No. 94743
900 North Point Street, Suite 220
San Francisco, CA 94109
Telephone: (415) 673-8000

TONY TAMBURELLO, ESQ. - State Bar No. 46037
TAMBURELLO, HANLON & WAGGENER
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 431-4500

Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS, Petitioner, v. ARTHUR CALDERON, Warden, CALIFORNIA STATE PRISON AT SAN QUENTIN, Respondent.	No. CIVS-92-0483 EJG GGH PETITIONER'S MOTION FOR DISCOVERY **DEATH PENALTY CASE**

Petitioner Bruce Wayne Morris, through his attorneys, hereby requests that the Court order that the following discovery be provided pursuant to Rule 6 of the Habeas Corpus Rules (hereafter "Habeas Corpus Rules") Following 28 U.S.C. section 2254.

Petitioner requests permission to obtain discovery with respect to certain limited claims or issues so that initial facts may be developed and further discovery sought at a later date, depending on the results of preliminary discovery proceedings. In part, this motion renews requests for discovery made in

September, 1993, and denied by this Court pending exhaustion of remedies in state court.

Petitioner wishes to reserve the right to request leave of Court for additional discovery proceedings depending on the results of all fact development procedures initiated on his behalf. Factual allegations regarding the requests herein are contained in the attached Declaration of Marianne D. Bachers.

I. DISCOVERY IS PERMITTED WHERE PETITIONER CAN DEMONSTRATE GOOD CAUSE FOR THE INFORMATION HE SEERS TO UNCOVER.

In Harris v. Nelson, 394 U.S. 286 (1969), the Supreme Court held for the first time that appropriate discovery procedures could be ordered on behalf of a habeas corpus petitioner. The Court stated at 394 U.S. 291:

> But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, where these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

Later Rule 6(a) cf the Habeas Rules was promulgated to comply with the Harris decision. It provides in relevant part:

Leave of court required.

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and the to extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

Courts have found that the Harris decision and Rule 6 entitle a habeas petitioner to a full and fair opportunity to develop the facts material to his constitutional claims. Coleman v. Zant, 708 F.2d 541, 545 (11th Cir. 1983), reversed on other grounds, 778 F.2d 1487 (11th Cir. 1985). Because habeas corpus is a civil proceeding, there are a number of discovery tools available to the district court to illumine claims which

require further factual development. Dickson v. Wainwright, 683 F.2d 348, 352 (11th Cir. 1982). The Court may permit the filing of interrogatories (Dickson v. Wainwright, 683 F.2d at 352]; depositions [Coleman v. Zant, 708 F.2d at 547; Ross v. Kemp, 785 F.2d 1467 (11th Cir. 1986)]; requests for production of documents and scientific evidence [Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992); McLester v. Smith, 802 F.2d 1330, 1334 (11th Cir. 1986)]; the taking of depositions and affidavits [Barry v. United States, 528 F.2d 1094, 1101 (7th Cir. 1976)]; and the development of statistical evidence [Ross v. Kemp, 785 F.2d at 1472-74; Harris v. Pulley, 885 F.2d 1354, 1372 (9th Cir. 1988)]. Where the state has more access to the information than the petitioner, such discovery devices are appropriate and may require the state to actively participate in assisting petitioner in obtaining the information. See Harris v. Nelson, 431 U.S. at 80, fn. 21; Thomas v. Goldsmith, 979 F.2d at 745; McKenzie v. Risley, 915 F.2d 1396, 1398 (9th Cir. 1990)[discovery ordered concerning prosecutor's ex parte contacts with trial judge]. Discovery from the state or its representatives may particularly be appropriate where the state has firsthand knowledge of the facts petitioner seeks to uncover. Blackledge v. Allison, 431 U.S. 63, 82, fn. 25 (1977) ["... district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge..."].

These authorities establish that where fact finding procedures will assist the court in determining the viability of claims in the petition, discovery should be ordered. Petitioner therefore requests that the Court enter an order requiring the production of documents and affidavits as discussed below.

II. ISSUES REQUIRING DISCOVERY

A. Discovery is required concerning the overall handling of the prosecution of this case.

Petitioner has raised a number of issues in the petition concerning the handling of the prosecution of his case. They are: Claim I [Avette Barrett's testimony was improperly admitted because it was impermissibly coerced and was false; Amended Petition at 13-17]. Claim II [Allison Eckstrom's testimony was improperly admitted because it was impermissibly coerced and false; Amended Petition at 17-19]. Claim XLII [The California statute is unconstitutional in

practice and application because the prosecutorial agencies of the several counties are given extensive discretion to choose the individuals to be selected for capital punishment. The selection is made in an arbitrary and capricious manner and is based upon inconsistent and undisclosed criteria which fails to narrow the class of persons who are eligible for capital punishment.Petitioner's death sentence is not proportionate to his individual culpability or to the punishment assessed against similarly situated defendants; thus, the statute violates equal protection; Amended Petition at 86-87].

REQUEST FOR PRODUCTION OF DOCUMENTS

Petitioner seeks discovery on each of these claims from the Attorney General, the Sierra County District Attorney, Attorney Gary Rossi, and the California Department of Justice. Petitioner requests that these agencies produce the following documents (FRCP 34):

1. Petitioner requests the prosecutor's files with regard to the prosecution of this case. Petitioner requests production of any and all memoranda, letters, audio tapes, any memorializations whatsoever, or any oral communications, concerning the plea agreements between the Sierra County District Attorney's office and Avette Barrett, as well as identical documentation concerning Allison Eckstrom's immunity agreement. Petitioner seeks the same information concerning modifications to the agreements and how the benefits were conferred upon Eckstrom and Barrett. This request includes memorializations concerning any assistance given to Sierra County by the Attorney General's office in *connection with* the immunity and plea agreements.

As the attached declaration of counsel indicates, the prosecution of this case was in something of a flux from the moment of its initiation. Sierra County was experiencing financial strain due to the seven homicides which had touched the county since May, 1984. Petitioner's case concerned the seventh homicide. The county prosecutor was inexperienced in handling homicide cases. The county was financially strapped, and sought and received substantial assistance from the Department of Justice and the Attorney General's office.

Barrett's appointed counsel became the county prosecutor. Her plea agreement was later modified in a manner that was extremely beneficial to her. Her prior counsel's appointment as

county prosecutor is rife with the possibility of conflict and overreaching. His position could be used to gain undisclosed benefits for Barrett and Eckstrom and to act in a punitive and unconstitutional fashion towards petitioner in the handling of the prosecution of his capital case.Petitioner submits that there is a great likelihood that the Attorney General was substantially involved in sorting out the conflicts, and the plea and immunity agreements and modifications, due to the inexperience of Attorney
Lowe and the role of Attorney Reichle as both prosecutor and, defense attorney in this case. If so, good cause exists for discovery from the Attorney General of the documents or oral communications sought with respect to these claims. East v. Scott, 55 F.3d 996, 1001-02 (5th Cir. 1995)[discovery required concerning role of private prosecutor during trial of capital case].

Before trial, petitioner requested that all impeaching and exculpatory information concerning Barrett and Eckstrom be disclosed to him, and made related constitutional motions. (CR 27-40, Motion for Discovery; CR 507-08, Petition to Inspect Juvenile Files; CR 615-21, Motion to Exclude Accomplice/Informer Testimony). The discovery sought here is directly relevant to the claims listed above, which were raised early in pre-trial proceedings. This circuit has held that Brady (Brady v. Maryland, 373 U.S. 83 (1963)) disclosure obligations apply in habeas corpus proceedings. Thomas v. Goldsmith, 979 F.2d at 749-50. Where there has been a showing that proceedings which affected a substantial trial right of petitioner's have not been disclosed to him, discovery should be ordered with respect to those issues. McKenzie v. Risley, 915 F.2d at 1398.

McKenzie is relevant for another reason as well. There, a special prosecutor had been appointed to prosecute McKenzie for capital murder. Prior to sentencing, the prosecutor met ex parte with the trial judge, ostensibly to discuss his bill. The Ninth
Circuit held that there was a genuine issue of material fact with respect to whether the judge and prosecutor discussed the merits of the case, and that this required discovery and other fact finding procedures. The conflicts suggested in the trial record (as discussed in the attached declaration of counsel) concerning the representation of Barrett and Eckstrom, and the prosecution of petitioner suggest that there are material issues of fact which

could be uncovered which would defeat Respondent's Motion.

Petitioner requests any documentation, written, oral or otherwise, which shows that Barrett and/or Eckstrom were treated by mental health professionals and were hypnotized by them, or were subjected to hypnosis at any time regarding this case.[1/] The use of testimony which is the result of hypnotically refreshed memory is not permitted in California. People v. Shirley, 31 Cal.3d 18 (1982). If either witness was hypnotized, disclosure of this information is required under the ruling of Kyles v. Whitley, 115 S.Ct. 1555 (1995).

Petitioner requests documents regarding deals or benefits conferred upon jailhouse witnesses Anthony Brooks and Charles Wharton. Petitioner also requests any and all records from the Sierra and Colusa County jails showing the locations of Wharton's and Brooks' jail cells in relation to Petitioner as well as information concerning their work assignments within the jails. (Claim V.) Although Brooks stated he had received no benefits from his testimony, it is our information and belief that he did in fact receive a reduced sentence. Whether the reduction was a quid pro quo is unknown; thus, discovery is necessary. Jail records are necessary in order to prove that the jailhouse witnesses had access to Petitioner and records about his case.

2. Petitioner request production of any and all memoranda, documents, or any memorializations or oral communications concerning the hiring and on-going employment of Gary Rossi by Sierra County as the Special Prosecutor in this case. Petitioner requests production of any and all memoranda, documents, or any memorializations or oral communications concerning Attorney Reichle's involvement in the prosecution of petitioner's case. This information is necessary to determine whether there were in fact conflicts of interest after Attorney Reichle was hired as county prosecutor. Moreover, to the extent that the Attorney General's office may have acted as a de facto prosecutor at this crucial time, or any other in the case, discovery from that agency should be required. Blackledae v. Allison, supra. These requests are relevant to Claim I.

3.Petitioner requests production of any and all memoranda, documents, memorializations or oral

---

1. During trial, Eckstrom testified that her memory was enhanced by dreams (RT 3948-49), a technique commonly used by hypnosis experts.

communications concerning the involvement of the Attorney General's office in any aspect of petitioner's trial prosecution. As the record in this case demonstrates, the Attorney General was substantially involved in this case and likely has information relevant to the claims mentioned herein. (See attached Declaration of Marianne D. Bachers).Given District Attorney Lowe's lack of experience, it would not be surprising if the Attorney General assisted Lowe in deciding what charges should be brought against petitioner and his accomplices; what deals should be struck with which witnesses; what plea or immunity agreement modifications should be made; what aggravating evidence should be presented; what special circumstances should be alleged; what investigation should be conducted; what witnesses should be called; and what evidence should be disclosed to the defense.

A defendant can complain of a conflict of interest on the part of the prosecution when he was actually prejudiced thereby. Young v. U.S. ex rel. Vuitton Et Fils SA, 481 U.S. 787 (1987); United States v. Heldt, 668 F.2d 1238, 1277 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1993). Petitioner has demonstrated that there may have been several conflicts of interest operative in the prosecution team. As Heldt and Lorenzo establish, petitioner may be entitled to habeas corpus relief if his case was improperly and prejudicially influenced by prosecutorial conflicts of interest.

And, where a prosecutor is a potential witness, the advocate-witness rule may bar his participation in the case. United States v. Tamura, 694 F.2d 591, 601 (9th Cir. 1982).[2/]

Petitioner has demonstrated good cause for discovery concerning prosecutorial conflicts of interest from those with firsthand knowledge of the conflicts:those individuals and governmental agencies who were involved in petitioner's prosecution, as shown in the trial record.

4. Petitioner requests all internal jail and prison records concerning Petitioner's mental and physical state for the time of his pre-trial and trial incarceration. These records are relevant to the determination whether petitioner was competent

---

2. Although Tamura concerned a prosecutor as a trial witness, the reasoning of that decision is certainly applicable where the credibility of a prosecutor may be at issue in an evidentiary hearing.

to stand trial or aid and assist his attorneys. (Claim XXXVIII). Competence to be tried is a claim which exists even if not raised on direct appeal. Medina v. Singletary, 59 F.3d 1095 (11th Cir. 1995).

5. Petitioner requests discovery of any and all memoranda, documents, training manuals, guidelines, or other documents concerning the capital charging policies of Sierra County from 1977 through 1993. Petitioner requests any and all, documents, memoranda, or oral cormt:nications the Sierra County District Attorney has concerning its capital charging decisions in all homicides occurring from 1984 through 1986. Petitioner request the standards for the prosecution of capital trials published by the state attorney general's office. This information is necessary to determine if the capital charging decision made in this case was arbitrary, capricious, or violated due process or equal protection in some other manner. This evidence is relevant to Claim XLII.

Where a state administers its capital charging scheme in a way that is shown to be arbitrary, capricious, and discretionless,a violation of the Eighth Amendment may be shown. Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Blanket eligibility for capital prosecution may also violate the Fifth and Fourteenth Amendments. Adamson v. Ricketts, 865 F.2d 1011, 1025 (9th Cir. 1988).

As described in the attached declaration, Sierra County prosecuted five murder cases from 1984 through 1986. At least three of these were prosecuted as capital murders. In two of the cases (Lee and Bradbury) the defendants had committed double murders. Petitioner was charged with committing a single homicide. The Egoberto case ended in a plea to first degree murder. It appears virtually every homicide which occurred in this county was prosecuted as a first degree murder by a prosecutor who had no experience in these cases. How the capital charging decisions were made in petitioner's case, as well as those in the years immediately before and after, will no doubt illuminate whether Sierra County prosecuted petitioner in conformity with the Eighth Amendment.

CONCLUSION

Petitioner therefore requests that the Court grant the discovery herein requested as it relates to the claims in his pending petition for writ of habeas corpus bacause he has shown goodcause for its disclosure.

DATED: s/ Feb. 28, 1996

Respectfully submitted,

s/: Marianne D. Bachers
MARIANNE D. BACHERS

s/ Tony Tamburello
TONY TAMBURELLO

Attorneys for Petitioner
BRUCE WAYNE MORRIS

MARIANNE D. BACHERS, ESQ. - State Bar No. 94743
900 North Point Street, Suite 220
San Francisco, CA 94109
Telephone:(415) 673-8000

TONY TAMBUP,ELLO, ESQ. - State Bar No. 46037
TAMBURELLO, HANLON & WAGGENER
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 431-4500

Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS, Petitioner, v. ARTHUR CALDERON, Warden, CALIFORNIA STATE PRISON AT SAN QUENTIN, Respondent.	No. CIVS-92-0483 EJG GGH DECLARATION OF MARIANNE D. BACHERS DEATH PENALTY CASE

I, Marianne D. Bachers, declare under penalty of perjury:

1. That I have been appointed to represent Petitioner in habeas corpus proceedings in this case. I make this declaration on the information and good faith belief that the facts are as I have averred herein.

2. It is my information and belief that Bruce Morris was charged with first degree murder in Sierra County on September 18,1985, just six days after the homicide in this case occurred. Avette Barrett was charged as a co-defendant with harboring and concealing Petitioner while knowing he had committed a crime. This was the most serious charge against Barrett.

3. On September 30, 1985, the complaint charging

petitioner was amended to add special circumstance allegations which made him death eligible. On September 30, 1985, the court issued a gag order and ordered that it be served on an attorney from the(California Department of Justice. (CR 16).

4. Press reports contained in petitioner's motion for change of venue disclose that Sierra County was undergoing severe financial strain due to the seven homicide cases which had arisen in the county in the last sixteen months. Petitioner's case was the seventh to be prosecuted. (The change of venue motion appears at CR 251-492)[1]. When the first homicide occurred in May, 1984, District Attorney Lowe had never handled a murder case. It is my information and belief that Attorney Lowe never tried any of the capital cases which arose in Sierra County and thus had no experience upon which to rely to make capital charging decisions. It is my belief that he received substantial assistance from some other state agency which advised him to charge these defendants with capital murder and that A`c.torney Lowe did not act with independent prosecutorial discretion.

5. Press reports in the change of venue motion show that of the seven murder cases, one was transferred to Nevada (no suspect was identified and the crime appeared to have originated in Reno); one case (People v. Greg Elliot) ended in a manslaughter verdict at trial and no special circumstances were alleged; and three were capitally charged. The capital cases were People v. Raymond Lee, People v. Lewis Bradbury, and People v. Bruce Morris. Another case, People v. Ricky Egoberto, pleaded out to first degree murder. The Lee and Bradbury cases were both double homicides. Lee was charged with killing two high school girls. Bradbury was charged with killing a set of 17 year old twins. Petitioner, as we know, was charged with a single homicide.

6. In connection with the financial strain on the county, District Attorney Lowe sought "assistance" from the Attorney General's office. He told members of the press that he had in fact received "substantial assistance" from the Attorney General's office in handling the case. The extent and nature of the assistance provided to the prosecution is unknown to petitioner.

7. Trial counsel Lyle Shattuck has informed me that it is

---

1. CR = Clerk's Record on Appeal to the California Supreme Court

his recollection that a member of the Attorney General's office made some appearances in this case, although he cannot recall the specifics of the appearances or the name of the attorney who appeared.

8. The preliminary examination was held on January 21-22,1986, in Sierra County. James Streeter, an investigator from the California Department of Justice, testified concerning evidence he retrieved from Nebraska. Streeter also testified at trial. The methods by which evidence was collected and preserved by Streeter was hotly contested by the defense. Representatives of the Department of Justice also were present at the crime scene andparticipated in seizing evidence. Evidence concerning these matters was presented at trial.

9. Attorney James Reichle was appointed to represent Avette Barrett in Sierra County. He negotiated a plea agreement for Barrett with District Attorney Lowe. In November 1986, Lowe resigned as District Attorney for Sierra County. Lowe's position was not filed until February 3, 1987, when James Reichle, Barrett's attorney, was named the Sierra county prosecutor. Reichle was not relieved of his appointment to represent Barrett until February 25, 1987. Barrett's plea agreement was subsequently modified to delete compliance with material and significant terms after her former attorney became the prosecuting attorney for Sierra County.

10. Gary Rossi was hired as a special prosecutor to handle petitioner's trial in San Joaquin County. His first appearance in the case is in San Joaquin in December, 1986.

11. It is my information and belief that members of the office of the California Attorney General sometimes try capital cases. It is my information and belief that deputies in the Attorney General's office sometimes handle these same cases on appeal and in habeas corpus proceedings following conviction of the defendant. Moreover, it is my information and belief that deputies attorney general give substantive advice and assistance to prosecutors trying capital cases and that such advice and assistance may be so substantial in nature that significant prosecutorial decisions affecting the outcome of the case, and hence petitioner's present detention, may have been made by both deputies attorney general and the trial prosecutor. If the trial prosecutors sought and received substantial and decisive assistance in the handling of the case from the Attorney General, and this assistance relates to the issues about which petitioner seeks discovery, the appropriate member of the

Attorney General's office should be required to disclose this information. Where the same attorney prosecutes a capital case -- or has substantial involvement in it -- and also handles the appellate and habeas corpus proceedings, a violation of the advocate-witness rule may arise. If depositions or an evidentiary hearing are deemed desirable, the credibility of the deputy attorney general may be at issue and his continuing participation as counsel of record should be examined.

12. It is my information and belief that such a situation exists with respect to another capital habeas corpus case pending in this district. Deputy Attorney General Ward Campbell was trial counsel in People v. Clarence Ray Allen. He was also the deputy attorney general who handled the appeal of the case. People v. Allen, 42 Ca1.3d 1222, 1235 (1986). He is counsel of record in federal habeas proceedings in the Eastern District. Allen v. Vasquez, No. CIV S88-1123 DFL JFM. Petitioner seeks to discover whether Deputy Attorney General Campbell alone, or in conjunction with other members of the staff of the Attorney General's office, participated in a substantial manner in the prosecution of petitioner. Petitioner also see}:s to discover generally the nature and extent of the involvement of the Attorney General in petitioner's trial.

The foregoing is true and correct to the best of my knowledge and belief. This declaration was executed on February 28, 1996, at San Francisco, California.

s/ MARIANNE D. BACHERS
MARIANNE D. BACHERS

DECLARATION OF SERVICE BY MAIL

Re: Bruce Morris v. Arthur Calderon
No. CIVS 92-0483 EJG GGH

I, Suzanne Ryan, declare that I am over 18 years old and not a party to the within cause. My business address is 900 North Point Street, Suite 220, San Francisco, California, 94109.I served a true copy of the attached:

PETITIONERS MOTION FOR DISCOVERY

on each of the following, by placing the same in an envelope addressed as follows:****

Ward Campbell
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Enclosed said envelope was then, on, February 28, 1996, sealed and deposited, with first class mail thereon, at San Francisco, California, the county in which I am employed, with delivery charges fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 1996, at San Francisco, California.

s/ SUZANNE RYAN
Suzanne Ryan

****A copy of this pleading was transmitted by facsimile machine to Deputy Attorney General Campbell on Wednesday, February 28, 1996.

MARIANNE D. BACHERS, ESQ.
State Bar No. 94743
312 Montcalm Street
San Francisco, CA 94110
Telephone:(415) 643-5919

ORIGINAL
FILED
NOV 19 1995

TONY TAMBURELLO, ESQ.
State Bar No. 46037
TAMBURELLO, HANLON & WAGGENER
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 431-4500
Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS, Petitioner, v. ARTHUR CALDERON Warden, CALIFORNIA STATE PRISON AT SAN QUENTIN Respondent.	No. CIVS-92-0483 EJG GGH PETITIONER'S REPLY TO SUMMARY JUDGMENT MOTION **DEATH PENALTY** **CASE**

TABLE OF AUTHORITIES

CASES

Alo v. Olim,
639 F.2d 466 (9th Cir. 1980) 33

Arizona v. Roberson,
486 U.S. -, 100 L. Ed. 2d 704, 108 S. Ct.
2093 (1988) 26, 27

Beck v. Alabama,
447 U.S. 625 (1980) 43, 44

Bird v. United States,
180 U.S. 356, 21 S. Ct. 403 (1901) 11

Bollenbach v. United States,
326 U.S. 607 (1946) 19

Bouchillon v. Collins,
907 F.2d 589 (5th Cir. 1990) 64

Boyde v. California,
494 U.S. 370 (1990) 17, 20

Brecht v. Abrahamson,
507 U.S. ___, 113 S. Ct. 1710 (1993) 33

Brotherhood of Carpenters v. United States,
330 U.S. 395, 67S.Ct.775(1946) 11

Calderon v. U.S. District Court,
96 F.3d 1126 (9th Cir. 1996) 72

Caldwell v. Mississippi,
472 U.S. 320 (1985) 21, 22

California v. Brown,
479 U.S. 538 (1987) 20,35

Campbell v. Blodgett,
997 F.2d 512 (9th Cir. 1992) cent. denied,
114 S. Ct. 1337 (1994) 29

Carella v. California,
491 U.S. 263 (1989) 12, 13, 14

Carter v. Kentucky,
450 U.S. 288 (1981) 42

Chavez v. United States,
656 F.2d 512 (9th Cir. 1981) 64

Clabourne v. Lewis,
64 F.3d 1373 (9th Cir. 1995) 64

Cook v. Lynaugh,
821 F.2d 1072 (5th Cir. 1987) 46

Cooper v. Sowders,
837 F.2d 284 (6th Cir. 1988) 69

Crane v. Kentucky,
476 U.S. 683 (1986) 28

Dawson v. Delaware,
503 U. S. 159 (1992) 37

Driscoll v. Delo,
71 F.3d 701 (8th Cir. 1996) 22

Drope v. Missouri,
420 U.S. 162 63

Drope v. Missouri,
420 U.S. 896 (1975) 49

Eddings v. Oklahoma,
455 U.S. 104 (1982) 14, 15

Evans v. Lewis,
855 F.2d 631 (9th Cir. 1988) 64

Francis v. Franklin,
471 U.S. 307 (1985) 19

Frye v. United States,
293 F.2d 1013 (D.C. Cir. 1923) 35

Gardner v. Florida,
430 U.S. 349, 97 S. Ct. 1197(1977) 17,18

Godinez v. Moran,
113 S. Ct. 2680 (1993) 49,63

Gray v. Mississippi,
481 U.S. 648 (1987) 45

Gray v. Netherland,
__ U.S. __, 117 S. Ct. 2074 (1996) 46

Gregg v. Georeia,
428 U.S. 153 (1976) 15

Hamilton v. Vasquez,
17 F.3d 1149 (9th Cir. 1994) 17

Harris by and through Ramsever v. Wood,
64 F.3d 1432 (9th Cir. 1995) 73

Harris v. Reed
(1989, 489 U.S. 255 72

Hendricks v. Vasquez,
974 F.2d 1099 (9th Cir. 1992) 73

Hicks v. Oklahoma,
447 U.S. 343 (1980) 5, 29, 37

Idaho v. Wright,
497 U.S. 805 (1990) 35

In re Clark,
5 Cal. 4th 750 (1993) 72

In re Juma P.,
204 Cal. App. 3d 1228 25

In re Neeley,
6 Cal. 4th 901 (1993) 73

Jamal v. VanDeKamp,
926 F.2d 918 (9th Cir. 1991) 29,34

Jackson v. Virginia,
443 U.S. 307 (1979) 57

Johnson v. Armontrout,
961 F.2d 748 (8th Cir. 1992) 29, 34

Johnson v. Mississippi,
486 U.S. 578 (1988) 73

Kealohanauole v. Shimoda,
800 F.2d 1463 (9th Cir. 1986) 31,32

Kenley v. Armantrout,
937 F.2d 1298 (8th Cir. 1991) 66

Kubat v. Thieret,
867 F.2d 351 (7th Cir. 1989) 17,19

Lincoln v. Sunn,
807 F.2d 805 (9th Cir. 1987) 69

Lockett v. Ohio,
438 U.S. 586 (1978) 14,15,16

Lokos v. Capps,
625 F.2d 1258 (5th Cir. 1980) 64

Maddox v. Lord,
819 F.2d 1058 (2d Cir. 1987) 74

Mak v. Blodgett,
970 F.2d 614 (9th Cir. 1992) 15,17

McGuire v. Estelle,
502 U.S. __, 116 L. Ed. 2d 385 (1991) 29

Michigan v. Jackson,
475 U.S. 625 (1986) 26

Middleton v. Dugger,
849 F.2d 491 (11th Cir. 1988) 67

Miller v. Fenton,
474 U.S. 104 (1985) 27

Mills v. Maryland,
485 U.S. 367, 108 S. Ct. 1860 (1988) 17

Miranda v. Arizona,
384 U.S. 436 (1966) 23, 24, 25, 26, 27, 48

Moore v. United States,
464 F.2d 663 (9th Cir. 1972) 49

Morales v. Calderon,
85 F.3d 1387 (9th Cir. 1996), cert. denied, __ U.S. __,
1996 WL 526377 72

Murray v. Carrier,
477 U.S. 478 (1986) 72

Pate v. Robinson,
383 U.S. 375, 86 S. Ct. 836 (1966) 49

Patterson v. Illinois,
101 Ed.2d 261, 108 S. Ct. 2389 (1987) 26

Payne v. Tennessee,
501 U.S. 808 (1991) 36

People v. Boyer
(1989, 48 Cal. 3d 247 25

People v. Brown,
40 Cal. 3d 512 (1985), reversed on other grounds ... 35

People v. Castro,
38 Cal. 3d 301 (1985) 29

People v. Clark,
5 Cal. 4th 750 (1993) 72

People v. Dewberry,
51 Cal. 2d 548 (1959) 39

People v. Dillon,
34 Cal. 3d 441 (1983) 38

People v. Geiger,
35 Cal. 3d 510 (1985) 41

People v. Gordon,
10 Cal. App. 3d 460 (1973) 9

People v. Ireland,
70 Cal. 3d 522 (1969) 42

People v. Johnson,
210 Cal. App. 3d 870 (1979) 41

People v. Kelly,
17 Cal. 3d 24 (1976) 35

People v. Morris,
53 Cal. 3d 152 (1991)..... 2, 13, 15, 19, 20, 27, 29, 31, 32, 34, 35, 36, 37, 43, 45, 69

People v. Ramkeesoon,
39 Cal. 3d 346 (1985) 42

People v. Sprulin
156 Cal.App.3d 119 (1984) 41

People v. Valentine,
28 Cal. 2d 121 40

People v. Watson,
30 Cal. 3d 290 (1981) 40

People v. Wickersham,
32 Cal. 3d 307 (1982) 41

Profitt v. Waldron,
831 F.2d 1245 (11 th Cir. 1987) 64

Robison v. Maynard,
829 F.2d 1501 (10th Cir. 1987) 74

Rule v. Wood,
93 F.3d 1434 (9th Cir. 1996) 15

Sanders v. Ratelle,
21 F.3d 1446 (9th Cir. 1994) 73

Schlup v. Delo,
513 U.S. __, 115 S.Ct. 851 (1995) 72

Schwachter v. United States,
237 F.2d 640 (6th Cir. 1956) 11

Simmons v. South Carolina,
512 U.S. __, 114, S. Ct. 2187 (1994) 18

Sims v. LiveLay,
970 F.2d 1575 (6th Cir. 1992) 73

Sochor v. Florida,
504 U.S. 527 (1992) 69

Spencer v. Texas,
385 U.S. 554 (1967) 29

Stansbury v. California,
114 S. Ct. 1526 (1994) 18, 27

Stringer v. Black,
503 U.S. 222 (1992) 69

Suniea v. Bunnell,
998 F.2d 664 (9th Cir. 1993) 12, 44

Teague v. Lane,
489 U.S. 288 (1989) 15

Taylor v. Kennedy,
436 U.S. 478 (1978) 15

Thomas v. Keohane,
116 S.Ct. 457 (1995) 27

United States v. Bagley,
772 F.2d 482 (9th Cir. 1985) 29

United States v. Brown,
720 F.2d 1059 (9th Cir. 1984) 7, 8

United States v. Davenport
753 F.2d 1460 (9th Cir. 1985) 33

United States v. Escobar de Bright,
742 F.2d 1196 (9th Cir. 1984) 12

United States v. Gaudin,
__ U.S. __, 115 S. Ct. 2310 (1995) 10

United States v. Hibler,
463 F.2d 455 (9th Cir. 1972) 30

United States v. Jones,
982 F.2d 380 (9th Cir. 1993) 8

United States v. Kallin,
50 F.3d 689 (9th Cir. 1995) 33

United States v. Lewis,
991 F.2d 254 (9th Cir. 19983) 49

United States v. Makris,
535 F.2d 899 (5th Cir. 1976) 59

United Sates v. Mandenhall,
446 U.S. 544 (1980) 26

United States v. Martin,
747 F.2d 14041408 (11th Cir. 1984) 10

United States v. Martin Linen Supply,
430 U.S. 564, 97 S. Ct. 1355 (1977) 11

United States v. Mentz,
840 F.2d 315 (6th Cir. 1988) 11

United States v. Partin,
493 F.2d 750 (5th Cir. 1974). 13

United States v. Rockwell,
781 F.2d 985 (6th Cir. 1986)... 13

Unit States v. Span,
75 F.3d 1383 (9th Cir. 1996) 73

United States v. Unruh,
855 F.2d 1363 (9th Cir. 1988) 43

United States v. Wallace,
848 F.2d 1464 (9th Cir. 1988) 30, 69

United States v. White Horse,
807 F.2d 1426 (8th Cir. 1986) 11

United States v. Winn,
577 F.2d 86 (9th Cir. 1978) 12

Wade v. Calderon,
29 F.3d 1312 (9th Cir. 1994) 22

Washington v. Murray,
952 F.2d 1472 (9th Cir. 1991) 73

Washington v. Watkins,
655 F.2d 1346 (5th Cir. 1981) 15

Williams v. Calderon,
52 F.3d 1465 (9th Cir. 1994) 69

Yates v. Evatt,
500 U.S. 391, 111 S. Ct. 1884 (1991) 12, 14

MISCELLANEOUS

California Welfare & Institutions Code
§ 5600, 5651.1(b) 51

California Evidence Code § 351.1 5

California Penal Code § 190.3 ..... 15, 28

C. Wright, Federal Practice and Procedure §485, at 711 . 11

Merck's Manual, pages 1394-1395 58

California
Penal Code § 1111 ..... 9, 28, 37, 38

Penal Code section 1097 38

MARIANNE D. BACHERS, ESQ.
State Bar No. 94743
312 Montcalm Avenue
San Francisco, CA 94110
Telephone:(415) 643-5919

TONY TAMBURELLO, ESQ.
State Bar No. 46037
TAMBURELLO, HANLON & WAGGENER
214 Duboce Avenue
San Francisco, CA 94103
Telephone:(415) 431-4500

Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS, Petitioner, v. ARTHUR CALDERON, Warden, CALIFORNIA STATE PRISON AT SAN QUENTIN, Respondent.	)	No. C.V. S-92-0483 E.G. GGH PETITIONER'S REPLY TO SUMMARY JUDGMENT MOTION DEATH PENALTY CASE

Petitioner Bruce Wayne Morris, through his attorneys, hereby responds to the Motion for Summary Judgment filed by Respondent. As the arguments below will establish, Respondent's motion should be denied and summary judgment should be entered on Petitioner's behalf with respect to prejudicial constitutional violations which occurred during the guilt and penalty phases of his trial, appeal and post conviction proceedings.

INTRODUCTION

Bruce W. Morris was convicted and sentenced to death for a crime that occurred in Sierra County. Petitioner asserted his innocence at trial, in his testimony and through counsel. On appeal and in post conviction and federal habeas corpus proceedings, Petitioner has consistently asserted his actual innocence of the murder of Ricky VanZant. The longstanding contention of this case is that Avette Barrette and Alison Eckstrom were the authors and actual perpetrators of the homicide of VanZant. Petitioner's central guilt phase defense was frustrated because instructions precluded the jury from considering whether Barrette and Eckstrom were the actual perpetrators, and because trial counsel did not investigate Barrette, Eckstrom or VanZant. The instructions precluded jury consideration of Petitioner's central theory of defense and deprived the jury of an instruction upon which it could vote to acquit Petitioner of VanZant's murder.

When the unconstitutional accomplice instruction was brought to the California Supreme Court for consideration, Justices Mosk and Broussard both wrote ardent dissents which called for reversal of the guilt phase based on the error in the instructions. See People v. Morris, 53 Ca1.3d 152, 235-244 (1991).

Likewise, instructional error at the penalty phase rendered the jurors' ultimate life and death decision wholly arbitrary, capricious, and unreliable. The jurors were given an instruction which told them that their decision was between life with parole and death. The jurors seized upon this instruction and specifically asked the trial court for an explanation of it during deliberations. The trial judge told the jurors the instruction spoke for itself. Thus, this jury gave its decision about the most important issue in this case while it labored under a complete legal and factual misapprehension about Petitioner's ultimate sentence. California Supreme Court Justices Mosk Broussard also dissented and severely criticized the Court's failure to find reversible constitutional error with respect the erroneous instruction, as well. As the amended federal habeas corpus petition claims, and as demonstrated below, there are other errors of grave constitutional magnitude in this case too.

As a whole, the constitutional violations which occurred herein create the distinct impression that Petitioner was never provided a forum in which his claim of innocence or that his

life should be spared could be fairly and accurately considered by the trier of fact. The violations of these touchstones of death penalty jurisprudence require that Petitioner's guilt and penalty convictions be vacated and that he be given a new trial.

I. THE TREATMENT OF ISSUES RELATED TO THE ACCOMPLICES IN THIS CASE REQUIRE THAT PETITIONER'S GUILT AND PENALTY CONVICTIONS BE VACATED. (Claims I, II, IX, & XXXIII)

A. Factual Background

The facts concerning Avette Barrett's and Alison Eckstrom's involvement in events surrounding Ricky VanZant's death, the testimonial inducements and enhancements provided to them, their truthfulness of their statements to law enforcement authorities and at trial, are disputed by Petitioner. Respondent has reiterated portions of the trial testimony and record which he believes support denial of this cluster of claims. However, it is the disputes about Barrett and Eckstrom which form the core of these constitutional violations. The centrality of Barrett's and Eckstrom's roles in these events makes the multiple errors concerning their guilt phase testimony indisputably material, prejudicial and reversible.

Petitioner and Respondent are in agreement that Bruce Barrett and Eckstrom all left Sacramento together in mid-September, 1985, and hitchhiked to the Lake Tahoe area. Barrett was Petitioner's paramour. Eckstrom was the 15 year old sister of Barrett. The parties agree that the hitchhikers were picked up by Ricky VanZant in the Lake Tahoe area.

It has been Petitioner's consistent contention that Barrett and Eckstrom were the original authors, initiators, and perpetrators of the plan to assault and/or kill VanZant and steal his van.[1/] This theory is and was not farfetched because Barrett

---

1. Petitioner did make a statement accepting responsibility for the death of VanZant when he was initially arrested in Nebraska. This was a false confession. Not comprehending the consequences of this ill conceived act of bravado, the statement was precipitated by Petitioner's mentally impaired and misguided belief that he should protect Barrett (whom he mistakenly believed to be carrying his child -- RT 21:4002, 4042-45, 4112-

and Eckstrom admitted suggesting stealing the van and/or stabbing VanZant to death when he left the three alone together, in his van, and when they reached their destination: a campsite, where the homicide occurred. (RT 20:3794-95, 3948-51, 3963, 21:4008-09, 23:4488).

Petitioner testified at trial that when they reached the campsite, he and Van Zant went fishing at the nearby river. VanZant, who was very drunk, went back to the van. Petitioner returned to the campsite about thirty minutes later to find Barrett crying, her dress bloodstained. Barrett said that _____ had tried to rape her. Eckstrom was also covered with blood _____ said she had killed VanZant. (RT 23:4592-98, 4602).

Petitioner looked in the van and saw VanZant lying on his back on his bed, with blood over his head and his pants down around his knees. Petitioner believed VanZant to be still alive and moved him to the side of an embankment. Together the three attempted to clean out the van and dispose of clothing. After Eckstrom screamed that VanZant was moving and hit him with branch, Petitioner moved VanZant down the embankment, figuring that he would get up and seek assistance after they left. (RT 23:4598-4603).

Petitioner, Barrett and Eckstrom drove to Nebraska where they picked up a hitchhiker named Tom Logan. As they drove together, the four came upon a wild marijuana field and harvested it. Comments were made about VanZant's untimely death to Logan. Logan decided to leave the group and alerted authorities.

Petitioner, Barrett and Eckstrom were arrested in Lexington, Nebraska, on September 15, 1985. Consistent with his life long inability to grasp the consequences of his actions due to organic brain damage, Petitioner took full responsibility for the VanZant death when he spoke to Nebraska authorities. All three were returned to Sierra County for prosecution.

---

14) and Eckstrom from punishment for their killing of VanZant. (RT 23:4604-06, 4647-48). Petitioner's demonstrated and lifelong organic brain damage has caused him, throughout this case, to make decisions the consequences of which have been to harm the very self interest he wanted to protect.

In any event, Petitioner testified at trial that he did not kill VanZant but that Barrett and Eckstrom did. (RT 23:4596-98, 4602).

B. The Unconstitutional Immunity Agreements And The Excluded Polygraph Test Evidence.[2]

When this prosecution was first initiated, Petitioner Barrett were both charged in a felony complaint. (CT, CSC 15). When Barrett reached a plea agreement with the Sierra County prosecutor, the cases were severed. (CT, CSC 3:647-48, 842-44). Eckstrom was prosecuted in juvenile court, but the petition was dismissed when she reached a plea agreement. (CT, CSC 9:2570-73).

Barrett's plea agreement[3] provided that she had to testify against Petitioner, take and pass a polygraph examination, and must not have personally inflicted any injuries against Ricky VanZant. At the conclusion of petitioner's trial, Barrett would be permitted to plead guilty to auto theft charges which had been filed against her. (CT, CSC 9:2567-68). If the conditions were not met, all benefits of the agreement were to be

---

2. To the extent that California Evidence Code § 351.1 precluded admission of Eckstrom's failed polygraph, and Barrett's refusal to submit to one, this statute violates due process and Petitioner's right to present exculpatory defense evidence. Hicks v. Oklahoma, 447 U.S. 343 (1980).

3. The terms of the agreement were: Upon the conclusion of the Sierra county murder trial against Bruce Wayne Morris, the prosecution shall move to dismiss all charges pending against Avette Barrett with the exception of 10851 of the Vehicle Code provided she pleads guilty to the crime of 10851 of the Vehicle Code. The foregoing offer is conditioned upon each of the following:

1. The representation made to Nebraska and California law authorities by Avette Barrett that she did not personally inflict any injuries upon Ricky VanZant is a true and correct representation, and;...

5. Avette Barrett testify completely truthfully at all proceedings including preliminary examination and trial concerning all of the facts and circumstances surrounding the killing and death of Ricky VanZant, the victim in the Sierra County murder case against Bruce Wayne Morris..., and,

6. Avette Barrett does not exercise her right to remain silent during any of the hearings or at trial in the Sierra County murder case against Bruce Wayne Morris..even if such testimony may implicate her in the commission of crimes in states other than California.

7. Avette Barrett takes a lie detector test at any time prior to June, 1986, at the direction of the Sierra County District Attorney or Sheriff's Department and pass the lie detector test on all points material to the murder case against Bruce Morris. (CT, CSC 2567-68).

withdrawn. Barrett signed the plea agreement on the morning of Petitic preliminary examination. She was then represented by James Reichle, Esq., who, during later stages of this case, became the District Attorney of Sierra County. (RT 9-2569; CT, CSC 7:1966).

Eckstrom's agreement provided complete transactional immunity agreement if she met conditions similar to those imposed upon Barrett. (CT, CSC 9:2570-71).[4]

Truthfulness provisions in plea agreements can wrongly infer that a witness is telling the truth, and that this has been determined by the prosecution, which is vouching for their credibility. Indeed, this circuit has expressed in the strongest terms its condemnation of the use of polygraph test provisions and prosecutorial vouching in order to shore up the credibility of witnesses of doubtful veracity. United States v. Brown, 720 F.2d 1059, 1069-75 (9th Cir. 1984).

The terms of the plea agreements, and the use of them at Petitioner's trial violated due process and fundamental fail. The jurors here were told that the plea agreement required the witnesses be punished if they violated its terms. In fact this was not true. As noted above, when the prosecutor learned that Eckstrom had physically harmed VanZant, instead of withdrawing the agreement, he simply deleted the term which

---

4. Eckstrom's agreement stated:

Upon the conclusion of the Sierra County murder trial against Bruce Morris, the prosecutor shall grant transactional immunity to Allicin Eckstrom pertaining to the facts and circumstances surrounding the killing of Ricky VanZant and the taking of the vehicle possessed by him at the time he suffered the injuries which led to his death, if, and only if:

1. The representations made to Nebraska and California law enforcement authorities by Allicin Eckstrom that she did not personally inflict any injuries upon Ricky VanZant is a true and correct representation, and; ....

5. Allsion Eckstrom testifies completely and truthfully at all of the proceedings including preliminary examination and trial concerning all the facts and circumstances surrounding the killing and death of Ricky VanZant, the victim in the Sierra County murder case against Bruce Wayne Morris, and;

6. Allicin Eckstrom does not exercise her right to remain silent during any of the hearings or at trial in the Sierra County murder case against Bruce Wayne Morris... even if such testimony may implicate her in the commission of crimes in states other than California.

Eckstrom violated.

Similarly, when Barrett could not take a polygraph, he did not require that she live up to the terms of the agreement.

The agreement here was illusory -- these witnesses were permitted to violate the terms with impunity and not suffer any consequences. Thus, the impression that they would be punished if found to be in violation was untrue and rendered their testimony unreliable and violated Petitioner's right to confront the witnesses against him. United States v. Jones, 982.F.2d 380, 384 (9thCir. 1993) . United States v. Brown, supra.

The prosecutor exacerbated these errors in closing argument when he tried to explain away the sisters' lies. RT 24:4800 ["Why would these girls make up the story..."]; RT 24:4801 ["it doesn't wash that they could have come up with a story such as this and independently given it to law enforcement personnel"]; RT 24:4794 ["I think it was very obvious that both girls were not totally honest with the officers during their multitude of out of court statements. I have some problems with some of their testimony in this courtroom."]See remaining discussion of sisters' testimony at RT 24:4794-4801.

C. The Unconstitutional Guilt Phase Jury Instructions Concerning The Roles Of Barrett And Eckstrom.

Trial counsel requested an instruction which embodied the theory of defense at guilt phase. Petitioner's proposed special instruction #1 defined an accomplice as an aider and abettor, ____d, as one who actually committed the crime at issue. (Clerk's Transcript in California supreme court [CT, CSC] 8:2235). The trial judge refused to give the requested instruction (RT 24:4727) and instead gave CALJIC 3.10, as modified, which stated:

> An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial. To be an accomplice, the person must have aided, promoted, encouraged or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person that committed the offense and with the intent or purpose of committing, encouraging or facilitating the commission of the offense.

(RT 24:4890-91).

The court also instructed the jury that if the crimes of robbery and murder were committed by anyone, Barrett and Eckstrom were accomplices as a matter of law. (RT 24:4892). The trial court's accomplice instructions were legally incorrect however, because California law states that accomplices are broadly defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial". Penal Code §1111; People v. Gordon, 10 Ca1.App.3d 460, 466 (1973). These instructional errors combined to deprive Petitioner of his Sixth, Eighth and Fourteenth Amendment rights to have the jury decide every disputed fact in the guilt phase of his capital trial.

One problem with these instructions is the language of the CALJIC instructions on criminal culpability and the use of the word "accomplice" -- a misnomer commonly understood to mean something different than the legal definition. The definition of an accomplice as a **general** proposition excludes a perpetrator who directly commits the crime. The aiding and abetting and accomplice instructions given here emphasize that if there "accomplice" there must also be **another person** who directly committed the crime. Even Black's Law Dictionary (Rev. 4th Ed.) construes accomplice as "[a] person who knowingly, voluntarily, and with common intent with the principal offender, united in the commission of the crime". It is likely that the jurors interpreted the term accomplice consistent with its common everyday meaning -- as one who assists another.[5/] Petitioner sought to remedy this confusion by proffering his own instruction which explained that Barrett and Eckstrom could have been the sole perpetrators -- petitioner's theory for acquittal -- and was rebuffed when the court refused it. No other instruction permitted the jury to so find. In fact, these instructions combined to prevent the jury from concluding that Barrett and Eckstrom committed the murder and Petitioner did not.[6/] Petitioner's conviction under these circumstances

---

5. See RT 24:4799-4800 for prosecutor's closing argument concerning Barrett and Eckstrom's role as "accomplices". His argument exploits the confusion about the implications of the sisters' "accomplice" status.

6. See United States v. Martin, 747 F.2d 14041408 (11th Cir. 1984), where confusing and analogous instructions on principal and aiding

cannot stand. As Justice Scalia has recently observed, Petitioner's right to have a jury decide guilt or innocence on every issue, including the application of law to facts, has a long and illustrious pedigree. United States v. Gaudin, ___ U.S. ___, 115 S.Ct. 2310; 2313-14 (1995) [upholding and applying this principle to requirement that jury determine materiality in false statements prosecution]. The chief responsibility of the trial judge is to explain the law, and to bring into view the relationship of the particular evidence to the particular issues involved. Bird v. United States, 180 U.S. 356, 21 S.Ct. 403, 405 (1901). In a jury trial, the primary fact finders are the jurors. United States v. Martin Linen Supply, 430 U.S. 564, 572, 97 S.Ct. 1355 (1977). When a jury instruction prevents consideration of a material issue, it is equivalent to a directed verdict on that issue and cannot be considered harmless. United States v. Mentz, 840 F.2d 315, 324 (6th Cir. 1988).

The purpose of an instruction is to inform the jury of its function, which is the independent determination of the facts, and the application of law, as given by the court, to the facts found by the jury. 2 C. Wright, Federal Practice and Procedure §485, at 711. "Thus, when a judge is no longer deciding the law that applies to the evidence but rather is applying the law to the facts-- facts that are determined after assessing the probative value of evidence introduced at trial -- the judge has invaded the jury's province. "United States v. White Horse, 807 F.2d 1426, 1429 (8th Cir. 1986).Similarly, a judge in a criminal case can not take from the jury a controverted question of material fact without running afoul of these well established principles. Schwachter v. United States, 237 F.2d 640, 644 (6th Cir. 1956).

The failure to give a requested theory of the case instruction which accurately states the law removes a crucial factual determination from the province of the jury and is tantamount to a directed verdict of guilty. Brotherhood of Carpenters v. United States, 330 U.S. 395, 67 S.Ct. 775, 782-83 (1946). When a trial judge deprives a jury of its fact-finding duty, the defendant's due process rights are violated. Car v. California, 491 U.S. 263, 265 (1989). Moreover, a habeas co_____ should not re-evaluate the evidence in an attempt to determine what a reasonable jury might or might not have done had it been properly instructed on how to apply the law to the

---

and abetting liability required reversal.

facts it found. Carella, 491 U.S. at 266. In this connection, the reviewing court may not consider the strength of the prosecution's evidence adduced at trial. The court must decide whether the jury was able to give actual consideration to the evidence which was the subject of dispute. Yates v. Evatt, 500 U.S. 391, 410, 111 S.Ct. 1884, 1894-96 (1991). And, where even a single juror voted for Petitioner's guilt under this constitutionally erroneous theory, reversal is required. Sunicta v. Bunnell, 998 F.2d 664, 670-71(9th Cir. 1993).

The right to a theory of defense instruction, which has some foundation in the evidence, has long been the rule in this circuit. United States v. Escobar de Bright, 742 F.2d 1196, 1198 9th Cir. 1984); United States v. Winn, 577 F.2d 86, 90 (9th Cir. 1978). The failure to give such an instruction constitutes reversible per se error, as the Ninth Circuit explained in Escobar de Bright:

> Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charge against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

(742 F.2d at 1201).

"The Supreme Court has recognized that where the government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness's credible ; subject to close scrutiny." United States v. Partin, 493 F.2d 750, 760 (5th Cir. 1974)(citing Gordon v. United States, 344 U.S. 414, 417, 73 S.Ct. 369, 372 (1953)). Jury instructions which confuse and mislead a jury concerning critical to defense theories and witness credibility determinations deprive a defendant of a fair trial. United States v. Rockwell, 781 F.2d 985, 991 (6th Cir. 1986) [reversing conviction for instructional error concerning evaluation of government witness's testimony].

These authorities lead inexorably to the conclusion that Petitioner's guilt phase convictions must be set aside. No instruction permitted the jury to ponder whether Barrett and Eckstrom were the actual perpetrators and to give effect to that conclusion by acquitting petitioner should they so decide. In fact, the instructions both impliedly and explicitly directed another conclusion: that Barrett and Eckstrom were mere

assistants in the scheme, and that the only person who could be the killer of VanZant was Petitioner.

The California Supreme Court fundamentally erred in its resolution of this issue. People v. Morris, 53 Ca1.3d 152, 210-11 (1991). The court noted a similar claim had been rejected in another case and that since the evidence was overwhelming that Petitioner was the perpetrator, any error in refusing the instruction was harmless. The Supreme Court's decision in Carella v. California, 491 U.S. 263, had issued well in advance of the decision here and had been brought to the attention of the state court, as had other federal constitutional underpinnings of the violation. (AOB, CSC p.148). The state court's reliance on the supposed "overwhelming" weight of the evidence against petitioner as the justification for affirmance was in direct contradiction to Carella and Yates v. Evatt, which require the court to determine if the contested instruction interfered with consideration of the defense evidence.

There were only three people who witnessed, the crime. Petitioner contended Barrett and Eckstrom were the perpetrators. They accused him. The case was a testimonial contest. It is impossible to say that the erroneous accomplice instruction, coupled with the failure to instruct on the central defense theory, did not contribute to the jury's finding that Petitioner killed VanZant. The state court's decision was patently incorrect because it ignored applicable longstanding and recent United States Supreme Court decisional authority.

For these reasons, Petitioner's guilt phase convictions should be reversed.

D. The Refused Mitigation Instruction Concerning The Sentences Of Barrett And Eckstrom.

At penalty phase, the defense requested an instruction which stated:

> In determining the existence of mitigating circumstances you must take into account that the defendant's accomplice Allicin Eckstrom was allowed to plead guilty to a reduced charge and was promised a sentence of dismissal. Avette Barrett was promised three years or less.

(CT, CSC 9:2452; RT 26:5265).

The trial court erroneously refused to give the instruction. The instruction was requested based on the theory that a

defendant is entitled to have all mitigating evidence in the case brought to the jury's attention. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Trial counsel considered the highly favorable treatment given to Barrett and Eckstrom, in contrast with Petitioner's eventual sentence, to constitute mitigation.

The failure to admit evidence of sentencing disparity as mitigation at a capital trial is reversible error. Mak v. Blodgett, 970 F.2d 614, 621 (9th Cir. 1992); Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996).[7] The evidence is relevant and admissible as one of the circumstances of the offense. Eddings, 455 U.S. at 110; California Penal Code § 190.3.

The California Supreme Court's treatment of this issue was brief (53 Cal.3d at 225) and erroneous. The state court said its prior precedent required rejection of this issue. The court did not acknowledge the federal constitutional issue raised by excluding this instruction from the jury's penalty consideration. The decision states that the general language of the charge on the statute was sufficient and that counsel was permitted to argue the inferences.

Arguments by counsel cannot substitute for instructions by the Court. Taylor v. Kennedy, 436 U.S. 478, 488-89 (1978). Only an instruction from the court can invest a particular concept or theory of the case with the imprimatur of the court. Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. 1981). Instructions are an indispensable mechanism for providing necessary guidance to a capital sentencing jury. Gregg v. Georgia, 428 U.S. 153, 193-95 (1976).

The state court's decision was contrary to the seminal supreme Court decision on mitigation: Lockett v. Ohio. Petitioner was once again deprived of a jury instruction which conveyed his theories concerning how the jury should evaluate the role of Barrett and Eckstrom -- only this error prejudiced the determination whether he would live or die. Trial counsel's words did not have instructional support for the request that the treatment of Barrett and Eckstrom be considered in deliberations. Because the jury was deprived of a basis upon which it could give mitigating effect to the involvement of, and

---

7. Both Mak and Rupe are based on the Supreme Court's decisions in Lockett and Eddings. Consequently, there is no Tag v. Lane, 489 U.S. 288 (1989), bar to application of these cases herein.

lesser sentences given to the accomplices, Petitioner's penalty phase conviction must be set aside.

II. THE JURY WAS MISLED ABOUT ITS SENTENCING OPTIONS AT PENALTY PHASE. (Claims XXXV, XXXVI, & XXXL)

A. The Jury Instructions Erroneously Stated that Petitioner Was Parole Eligible.

One of the instructions the jury received completely misinformed it about the sentence Petitioner would receive. After inquiring about what the court would do if they failed to agree on a sentence, the jurors requested clarification regarding one of the written instructions which they had in the jury room. (CT, CSC 9:2530-32; RT 26:5347-48). The instruction about which they inquired stated:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison with possibility of parole, you must give the defendant the benefit of the doubt and return a verdict fixing the penalty of life with the possibility of parole.

(CT,CSC: 9:2504; RT 26:5348, 5358, 5377).

After learning that the jury was divided 10-2, the judge told the jurors that: "[t]he instruction itself is self-explanatory. And we would hope with that in mind, that you might be able reach a decision." (RT 26:5347-48). Thereafter, the jury sentenced Petitioner to death.

Where inaccurate information is given to a capital sentencer and petitioner has no opportunity to object or correct the inaccuracy, the petitioner's death sentence must be reversed. Gardner v. Florida, 430 U.S. 349, 361, 97 S.Ct. 1197 (1977).

Where a jury receives inaccurate or misleading instructions concerning the parole eligibility of a capital defendant, the penalty judgment must be reversed. Hamilton v. Vasquez, 17 F.3d 1149, 1160 (9th Cir. 1994). The Ninth Circuit found that an instruction concerning Hamilton's supposed parole eligibility was unconstitutional because it allowed the jury to impose a death sentence based upon improper assumptions. 17 F.3d at 1163. Finding a violation of the reasonable likelihood standard announced in Boyde v. California, 494 U.S. 370, 380 (1990), the Court stated:

> ....[w]e have no difficulty concluding that there is a

> reasonable likelihood that the jury impermissibly applied the modified Briggs instruction . The jury in this case deliberating under these instructions could not have made the constitutionally mandated reasoned and informed choice between a sentence of life imprisonment without the possibility of parole and a sentence of death.

(17 F.3d at 1164).

Where erroneous instruction has misled even a single juror about the ultimate sentence to be imposed in a capital case, the reliability of the penalty determination has been undermined. Mills v. Maryland, 485 U.S. 367, 377, 108 S.Ct. 1860 (1988); Kubat v. Thieret, 867 F.2d 351, 371 (7th Cir. 1989); Mak v. Blodgett, 970 F.2d 614, 625 (9th Cir. 1992).

Finding its decision compelled by Gardner, the Supreme Court held in Simmons v. South Carolina, 512 U.S._, 114 S.Ct. 218_, 2194 (1994), that the failure to inform the penalty jury that the defendant was ineligible for parole violated the Eighth Amendment. Simmons is factually similar to petitioner's case. There the trial judge refused to instruct the jury that life without parole meant that Simmons could never be paroled. The jury came back during penalty deliberations and asked whether the imposition of a life sentence carried with it the possibility of parole. 114 S.Ct. at 2192. Simmons' judge responded to the question and told the jurors not to consider parole eligibility, but also that life imprisonment was to be understood in its plain and ordinary meaning. Shortly thereafter, a death sentence was announced.

The factual situation in Petitioner's case is far more egregious and disturbing than those above mentioned. The jury received a written instruction which advised them that if they were in doubt about the sentence to impose, petitioner would receive a windfall ---- life WITH parole! Moments before, the jury had inquired what would happen if there was a hung jury, possibly in an attempt to reassure themselves that there would be no parole for Mr. Morris. Instead, when they directly asked about the instruction which was the source of their concern, their worst fears were realized: the judge thoroughly endorsed the incorrect instruction by saying its terms spoke for itself. Of course, the instruction was legally incorrect because the sentencing alternative to death in this state is life without parole.

The final communication petitioner's jury received from

the court before deciding penalty was constitutionally invalid misinstruction on the sentence choices in this case. As the Seventh Circuit noted:

> Indeed, if only one juror had been confused, the reliability of the verdict is undermined. For if that one juror thought that the death penalty should not be imposed he or she might have submitted to the views of the other eleven because of the mistaken belief[about the sentencing scheme].

(867 F.2d at 371).

Once again, the California Supreme Court failed to grasp the federal constitutional problems posed by the instructional error here. Morris, 53 Ca1.3d at 227-32. The state court majority found that the jury could not have been confused because arguments and other instructions discussed life without parole as the alternative sentencing option. This reasoning completely ignores the Eighth Amendment's requirement of capital sentencing reliability and the context in which this error occurred. The state court's reliance on other correctly formulated instructions is irrelevant to this discussion[8/] -- the jurors were concerned with the erroneous instruction and said so. Rather than respond to the query with concrete accuracy9, the trial court approved[9/] the incorrect instruction and, in effect, wished the jury well in reaching a verdict now that they knew Petitioner could be paroled. When this was the response the jurors received, it makes no difference that they had been told innumerable times before about life without parole; in this circumstance, they were specifically advised that petitioner could receive life with parole. It was with that last constitutionally mistaken impression that the jury retired to continue deliberations and ultimately sentence petitioner to death.

It is important to note that the state court's discussion of this issue relies upon cases[10/] in which the instructions subject

---

8. Language which contradicts and does not explain a constitutionally infirm instruction will not suffice to excuse the infirmity. Francis v. Franklin, 471 U.S. 307, 322 (1985).

9. Bollenbach v. United States, 326 U.S. 607 (1946).

10. California v. Brown, 479 U.S. 538 (1987); Boyde v. California, Supra.

to dispute were found to pass constitutional muster. 53 Ca1.3d at 231. It cannot be plausibly argued that is so here. Thus, the legal standard employed by the state court is inapplicable.

Finally, the arguments advanced here are based upon well established Supreme Court and federal appellate federal constitutional authority. The state court's decision is at odds with these decisions and should be reversed.

B. The Gardner Error Was Exacerbated By The Trial Judge's Earlier Comments About The State Supreme Court's Reversal Rate. (Claim XXIV)

When the venire was first brought into court in the initial proceedings in this case in San Joaquin County, the trial judge said to the prospective jurors:

> The Supreme Court, for the last 56 cases that they have decided about the death penalty, and I'm sure all of you have read about the Supreme Court. There have been 56 cases, ladies and gentlemen, since 1972, I believe, that have talked about death penalty cases. Fifty-three of them were reversed. In these cases, we are given guidelines - I, as a trial judge, was given guidelines as to how we talk to you about this matter. These guidelines are still in effect. I'm still bound by these and so are you. None of us are above the law.

RT 5:566.

Defense counsel objected to the comments. RT 5:590. The judge attempted to admonish the jury about the import of his comments. He said:

> Ladies and gentlemen, I have been requested to admonish you a little bit about what I said in the hearing concerning amount of cases heard by the Supreme Court, 56, I believe I mentioned in number and reversals therein. The Court, m, personally, did not mean to indicate to you one way or the other how I felt about that matter. The Court only wanted to indicate to you that these 56 cases gave us guidelines, which I am obligated -- and I think I told you, that I'm obligated to follow in cases of this nature. And that's all I intended to do. I do not intend to indicate my favor or disfavor for these decisions. I only indicated it was a threshold, the comment concerning the guidelines, that we have to follow.

RT 5 :593.[11]

The trial court's comment plainly violated Caldwell v. Mississippi, 472 U.S. 320 (1985). In Caldwell, the United States Supreme Court reversed a death sentence where the prosecutor argued at penalty phase that an appellate court would automatically review any death judgment that was entered. The Supreme Court found that the prosecutor's comments were improper because they lessened the jury's sense of responsibility for the appropriateness of imposing a death sentence. Id., at 341.

The error here was more egregious than that which occurred in Caldwell, and was exacerbated by the instructional errors which occurred during the penalty deliberations. Petitioner's jury was informed at the very outset of the case that its decision was going to be reviewed by a court which had reversed almost all the cases which had come before it. The judge's attempt at a cautionary instruction did nothing to deter its earlier comments. If anything, it made the situation worse because the trial judge again emphasized the number of death penalty cases which had been reversed. Moreover, the court, not the prosecutor, gave the jury the offending information. Justice O'Connor observed in her concurring opinion in Caldwell that there was "no valid state penological interest" in imparting incorrect or misleading information to a capital jury. 472 U.S. at 342-43. Thus, the trial court's comments wrongly gave judicial imprimatur to the disputed information and impermissibly misled the jurors.

That the misleading comments first came during voir dire does not diminish the harm. It is the combination of the voir dire comments and the later instructional error with respect to the ultimate sentence Petitioner was to receive which require reversal here. See Driscoll v. Delo, 71 F.3d 701, 713-14 (8th Cir. 1996)[prosecutor's comments during voir dire and closing argument constituted Caldwell error and require reversal].

---

11. Although one might think that these comments fell by the wayside for the venire, it ,is highly doubtful that they did. Jury selection in this case began just a few months after a bitter election in California in which chief Justice Rose Bird and two Associate Justices were voted out of office. The election was the culmination of a lengthy, bitter campaign in which the state supreme court's death penalty decisions were touted as a critical justification for the electorate not to retain the targeted justices.

Taken individually and in combination, the errors in instructing this jury concerning its sentencing decision require that this Court grant penalty phase relief. See Wade v. Calderon, 29 F.3d 1312, 1324-25 (9th Cir. 1994)[granting habeas relief for Caldwell error in combination with other penalty phase errors].

III. PETITIONER'S STATEMENTS TO LAW ENFORCEMENT AUTHORITIES WERE IMPROPERLY ADMITTED AT THE GUILT PHASE OF HIS CAPITAL TRIAL.[12] (Claim VI)

A. Factual Background[13]

On the night of September 15, 1985, Nebraska law enforcement officials received information that Bruce Morris and two female subjects had killed a man and were in possession of his van which contained marijuana. RT 1:31-32.) Sometime before midnight of September 15th, the van was spotted outside the Motel Royal in Lexington, Nebraska. Officers confirmed the van, contained marijuana and that a Bruce Morris and two girls were registered at the motel. RT 1:33-34, 48-50, 58-65.

As a result, at least four officers, including Martin Kuxhausen of the Nebraska State Police deputies, Diane Reiber of the Lexington City police department and her husband, Gary Reiber of the Dawson County Sheriff's office, went to Morris' room, knocked on the door, identified themselves and sought entry. RT 1:34-36, 65-67, 140-141. At that time, appellant was not free to go.RT 1:70. Kuxhausen then began questioning Morris regarding his identity and the ownership of the van without first advising him of his Miranda rights. RT 1:66-70, 140-141. When Morris admitted he was driving the van, he was arrested along with Eckstrom and Barrett. RT 1:37, 141-142.

---

12. Claim VI.

13. Petitioner also contends that any statements taken from him by Nebraska authorities should have been challenged by trial counsel based on his incompetence to validly waive rights associated with taking of a statement. See Sections XI and XII below. To the extent that these arguments were not made by trial counsel, the failure to do so amounts to prejudicial ineffectiveness.

At approximately 1:30 a.m. after being read his Miranda rights, Morris refused to speak with law enforcement without advice of counsel. RT 1:96-97, I42-143. That morning, Barrett and Eckstrom were arraigned, but Morris was not. RT 1:97-98, 191- 192. Instead, approximately twelve hours after his arrest, Morris filled out an Inmate Request Form requesting to discuss the crime for which he was being charged. RT 1:97, 164-165, 188, 204-208.

Pursuant to his request, Wilson Dukes, a criminal investigator for the Dawson County Sheriff's Office contacted Morris. RT 1:163-166. Morris told Dukes he wanted to talk about the assault in California if certain concessions were made. Specifically, he did not want Barrett and Eckstrom charged with any crimes. Second, he wanted to talk to Barrett before giving a statement. RT 1:166-167. Dukes responded that he had no authority to grant such concessions, but would contact County Prosecutor Glen Clark. RT 1:167.

Approximately ten minutes later, Clark and Deputy Reiber arrived. RT 1:168-70. At approximately 2:30 p.m. Morris was advised of his Miranda rights and signed a waiver. RT 1:171-72, 187, 241-42. Barrett then was brought in and Morris was allowed to talk to her for approximately five minutes in the presence of Dukes, Clark and Reiber. RT 1:173-74. At approximately 2:45 p.m., they went across the street to the courthouse where Morris gave a statement which was tape-recorded. RT 1:174-76. The interrogation terminated at 3:50 p.m. RT 1:184.

At approximately 4:30 p.m. Morris was arraigned on a felony complaint for possession of marijuana. RT 1:98-99, 189; CT 10:2724-26. At that time, he requested counsel and the matter was continued. CT 10:2725-26.)[14]

Sometime between 7:00 and 8:00 that evening, Dukes contacted Morris and asked him to provide further information regarding the location of the body as California authorities could not locate the victim's body. RT 1:177; RT 19:3633, 3712.[15] Dukes claimed he readvised Morris of his Miranda

---

14. Thereafter, on September 18, 1985, counsel who was appointed to represent appellant on the Nebraska marijuana charges appeared on behalf of appellant who waived extradition on the charges which are the subject of this case. (CT 10:2724-2728.)

15. Nebraska officials had been working with Sierra County

rights, but did not read them verbatim nor did he have appellant sign an additional waiver agreement. RT 1:177; RT 19:3710.[16] Morris agreed to answer Dukes' questions from which Dukes was able to prepare a map of the area where the body was located. RT 19:3708.

Appellant moved to suppress these various statements Morris made to Nebraska authorities. CT 1:147-52. After a pretrial hearing, the trial court denied the motion.[17] RT 1:285; CT 2: 497-500. Thereafter during trial, appellant specifically moved to suppress the map which had been the product of the later interrogation. RT 19:3701-04. The trial court denied this motion. RT 19:3711-12.

B. The Initial Interrogation

Miranda warnings are required prior to police interrogation "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also United States v. Mandenhall, 446 U.S. 544, 555 (1980). Miranda applies "to protect persons in all settings in which their freedom of action is curtailed in any significant way." Id. at 467.

C. The Post-Arraignment Interrogation

After appellant was arraigned and requested counsel, he was again interrogated by Nebraska officials. This interrogation

---

officials since the time they received information that Morris and his two female companions may have been involved in a homicide in California. (CT 1: 19-20; RT 1: 184-185.)

16. Dukes did not give appellant Miranda warnings; rather, he asked him if he understood the rights he had been given earlier. (RT 19: 3710.)

17. Since appellant's trial, the Court has held that pretrial rulings on evidence generally may not be sufficient and an objection to introduction of the evidence at trial should be made to preserve the issue for appeal. Moreover, the practice utilized appears to be common and sound and supported by prior opinions. (See In re Juma P. (1988) 204 Ca1.App.3d. 1228, 1236.) Although a specific objection should be made at the time the evidence is introduced at trial, where an objection would be futile in light of the pretrial ruling, it appears no subsequent objection is necessary. (People v. Boyer (1989) 48 Ca1.3d 247, 270 n. 13.)

violated appellant's rights to counsel and to be free from self-incrimination under the federal and state constitutions.

> [O]nce an accused has expressed his desire to deal with the police only through counsel, he should not be subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication. Patterson v. Illinois 101 Ed.2d 261, 271, 108 S.Ct. 2389(1987).

In Michigan v. Jackson, 475 U.S. 625, 629-630 (1986), the United States Supreme Court recognizes that post-arraignment custodial interrogations implicate the constitutional protections afforded by both the Fifth and Sixth Amendments. While a knowing and intelligent waiver may satisfy Fifth Amendment concerns, the Sixth Amendment prevents an accused who has requested counsel from being questioned outside the presence of counsel. Id. at 631-32.

Thereafter, in Arizona v. Roberson, 486 U.S.___, 100 L.Ed.2d 704, 711, 108 S.Ct. 2093 (1988), the High Court held that where a suspect cuts off interrogation by requesting counsel, the police are forbidden to initiate interrogation as to a second, unrelated offense, without providing counsel . . .

> [T]he relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State like, has been thought to outweigh the burden that the decision in Miranda imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis. Id., at 713.

The fact that the interrogating officer is unaware of the suspect's earlier request for counsel does not alter this result. Id., at 717.

The state court found that all of the statements were properly admitted. 53 Cal.3d at 195-204.

This court is required to make an independent determination of the admissibility of Petitioner's statements, as

well as whether he was in custody at the time he was questioned. Miller v. Fenton, 474 U.S. 104 (1985); Thomas v. Keohane, 116 S.Ct. 457 (1995).

First of all, the state court wrongly found that Petitioner was not in custody at the time of his initial interrogation. This contention has recently been rejected in Stansbury v. California, 114 S.Ct. 1526 (1994). The questioning here occurred in custodial circumstances and its testimonial fruits should have been excluded.

The state court also rejected Petitioner's claim that allowing him to speak to Barrett before making a statement constituted coercion. The combination of Petitioner's long standing mental impairments, organic brain damage, the inherent stressfulness of the situation, and his erroneous belief that Barrett was pregnant, among other factors, worked together to coerce and compel Petitioner to waive his Miranda rights. (See Sections XI & XII, below). A valid waiver was not possible under these circumstances, and Petitioner's statements should not have been admitted against him.[18]

For reasons identical to those above, Petitioner's post-arraignment statements should have been excluded.

IV. GUILT PHASE EVIDENTIARY ERRORS VIOLATED PETITIONERS RIGHT TO A FAIR TRIAL. (Claims

A. Impeachment with Prior Felony Convictions (Claim V)

Petitioner asked the trial court to exclude evidence of his prior convictions at guilt phase. CT, CSC 4:991. Petitioner's priors were a 1977 auto theft conviction[19]; a 1978 conviction

---

18. Additionally, trial counsel was ineffective in seeking expert psychiatric assistance with respect to a challenge to the admissibility of these statements. Alternatively, counsel could have sought to explain the circumstances under which the statements were given to the jury in order to put them in a more favorable context at guilt phase. Crane v. Kentucky, 476 U.S. 683 (1986).

19. California Penal Code § 10851.

for simple kidnapping[20], attempted rape and assault with intent to commit rape; a conviction in 1980 for simple kidnapping[21]; and an escape conviction in 1980[22]. CT, CSC 4:1037-38; RT 3:207-08.

The trial court admitted the car theft and the two kidnapping convictions, and excluded the escape. RT 3:207-08. When Petitioner testified, he was impeached with the simple kidnapping convictions, the car theft conviction, the attempted rape, and the assault with intent to commit rape. RT 23:4603, 4627. This ruling was unconstitutional.

At the time this case was tried, the trial judge was required to make a determination whether the admission of the prior convictions was more probative than prejudicial. People v. Castro, 38 Cal.3d 301, 307 (1985). He did not. This was reversible error.

The California Supreme Court found that the trial court properly admitted the convictions. 53 Cal.3d at 194-95. It did also note that the trial judge "did not specifically articulate all of the factors identified in case law in making its ruling". The state court then said that because defendant cited no authority imposing such a requirement, he lost. 53 Cal.3d at 194.

Where a state procedure or evidentiary ruling violates due process, fundamental fairness is violated. Jamal v. VanDeKamp, 926 F.2d 918, 919 (9th Cir. 1991). See also McGuire v. Estelle, 502 U.S. __, 116 L.Ed.2d 385, 396 (1991). This circuit has articulated the rule in this fashion:

> Hicks v. Oklahoma, 447 U.S. 343 (1980), recognized that state laws which guarantee a criminal defendant procedural rights... if not themselves constitutionally required, may give rise to liberty interests protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause.

Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1992) cert. denied, 114 S.Ct. 1337 (1994).

This circuit has long recognized the inherent prejudice in admitting prior convictions which are identical to those for which the defendant is on trial. United States v. Bagley, 772

---

20. Penal Code § 4530.

21. Penal Code § 207.

22. Penal Code § 4530.

F.2d 482, 487 (9th Cir. 1985). And, the determination of whether the admission of such convictions is more prejudicial than probative has been a long standing consideration in a criminal trial. Spencer v. Texas, 385 U.S. 554, 617-20 (1967).

The trial court's action here amounted to an exercise of arbitrary and standardless discretion. The similarity of the prior offenses to the case on trial was indisputable. The convictions impeached and undermined Petitioner's testimonial credibility. In remanding a case back to the district court which has similar facts and legal problems, the Ninth Circuit had this to say:

> Our court is particularly sensitive to allegations of prejudice where, as here, the convictions are based on the largely uncorroborated testimony of a single accomplice or co-conspirator. See United states v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972). Given the centrality of the contest between the defendants and the co-conspirator witness, we are particularly troubled by the possible cumulative effect of those errors which go to the credibility of the witnesses: the Jencks violation, the improper admission of the heroin conviction, and the prosecutorial vouching. In this context, we do not find that a balkanized, issue-by-issue harmless error review would be very enlightening in determining whether the appellants were prejudiced by the errors.

United States v. Wallace, 848 F.2d 1464, 1475-76 (9th Cir. 1988).

Under these circumstances, this court should find that the state court wrongly found the convictions were properly admitted and vacate the guilt phase convictions.

B. Jail Escape Evidence (Claim III)

Jail inmate Anthony Brooks testified at guilt phase that Petitioner sought his assistance in escaping from the Colusa County Jail. RT 21:4160-61. Brooks reported the alleged conversation to jail personnel. RT 21:4162, 4164. Petitioner moved to exclude this testimony and denied Brooks' accusation. RT 3:38, 69; 23:4606-07. The jury was instructed that evidence of flight could be considered consciousness of guilt. RT 24:4883.

Like the prior conviction evidence discussed above, the judge held a hearing on the admissibility of the escape

evidence. RT 3:142-49. And, despite an objection that the evidence was more prejudicial than probative -- like the challenged prior conviction evidence -- the judge did not make a definitive ruling before allowing Brooks to testify. RT 21:4160-62.

The state court reached the merits of the claim. 53 Cal.3d at 195. The court found that evidence of an escape plan properly permitted an inference of consciousness of guilt, even though nothing was ever done about it. Lastly, the court found that any error was harmless given the "overwhelming evidence" of Petitioner's guilt.

Due process is violated where the probative value of evidence is outweighed by its prejudicial effect, and that evidence is admitted at trial against a defendant. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465-66 (9th Cir. 1986). The trial court recognized the prejudicial effect of the escape evidence because he excluded Petitioner's prior conviction for that offense. The court also recognized the escape evidence would have a very negative impact on jurors' fair assessment of sentence at the penalty phase as well.[23] This error requires reversal on its own and should also be evaluated in combination with the other evidentiary errors committed by the trial court.[24]

C. Admission of the Excluded Evidence on the Audiotape (Claim VIII)

Petitioner made a taped statement to Nebraska law enforcement authorities after he was arrested for a marijuana offense. The taped statement was reviewed by the court and the parties in order to exclude the introduction of prejudicial information before the jury. RT 19:3643-46, 3655-59. The court ruled that parts of the tape were not to be played to the jury, nor was Petitioner to be asked about them. RT 19:3667-80, 3741-47. Nonetheless, some of the excised portions of the tape were played for the jury.

The stricken part of the tape contained comments by

---

23. At penalty phase the jury was told to consider the evidence from guilt phase in reaching its sentencing decision. RT 26:5332.

24. To the extent that this court finds trial counsel failed to preserve challenge to this evidence, it is Petitioner's contention that trial counsel was prejudicially ineffective.

Petitioner that suggested he was involved with drug dealing and underground people. RT 19:3668-71. The jury heard it. RT 19:3748-50. A defense motion for mistrial was denied. RT 3750-51. The trial judge noted that both parties had participated in sanitizing the tape and that the error was inadvertent. The judge admonished the jury about the tape the next day. RT 20:3759-60.

The state supreme court found that the inference of prejudice was not overwhelming because the offending passage was brief and the jury was instructed to disregard it. 53 Ca1.3d at 204.

The court also excluded Petitioner's comment that he "won't cop to nothing I ain't done". RT 19:3674. The prosecutor asked about it anyway. A defense mistrial motion was denied. RT 23:4682-83. Similarly, the state court found no error here. It also found the prosecutor did not commit misconduct.

These rulings were improper. First of all, the evidence the subject of this claim was excluded as prejudicial. Its admission under these circumstances violated due process. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465-66 (9th Cir. 1986). Secondly, the prosecutor's questioning of Petitioner concerning his insistence that he wouldn't "cop" to what he hadn't done, was prejudicial and reversible misconduct. See United States v. Davenport, 753 F.2d 1460, 1463-64 (9th Cir. 1985) [reversible error for prosecutor to cross-examine in absence of good faith belief that evidence sought is admissible]; Alo v. Olim, 639 F.2d 466, 468-69 (9th Cir. 1980) [prosecutorial questioning concerning post-arrest silence reversible error where evidence was close]; United States v. Kallin, 50 F.3d 689, 693-95 (9th Cir. 1995) [prosecutorial questioning about defendant's post arrest silence constitutes reversible error; curative instruction failed to cure harm; strength of evidence not relevant where defendant's testimonial credibility damaged by improper questioning]. Where, as here, the Respondent has not proven that the errors pass the harmless beyond a reasonable doubt standard, reversal is required. Brecht v. Abrahamson, 507 U.S.__, 113 S.Ct. 1710, 1717 (I993); Kallin, 50 F.3d at 693.

D. The Letter to Avette Barrett (Claim IX)

The trial judge admitted into evidence a copy of a letter sent to Avette Barrett in early October, 1985, when she was incarcerated at the Nevada County Jail. It contained allegedly

inculpatory statements -- that Petitioner had killed before for Barrett and would do it again. RT 21:4037-39. Barrett destroyed the original. The copy introduced into evidence was made when Barrett's mail was censored by jail personnel. RT 21:4153-55. The copy was missing at least a page. RT 21:4157 22:4249. Defense counsel objected to its admissibility. RT 21:4034-36,4039. The motion was denied, and the letter was read to the jury and admitted into evidence. RT 21:4040-41.

The state supreme court found these contentions lacking in merit and reached the merits of the appellate contentions. 53 Ca1.3d at 204-05. The court found no violation of the Best Evidence Rule, and that the letter was relevant given the admissions made therein.

The letter was improperly admitted. Its prejudicial effect outweighed its probative value. Its admission rendered the trial fundamentally unfair. Jamal v. VanDeKamp, 926 F.2d at 919.

E. Unreliable Scientific Evidence (Claim X)

At a pre-trial hearing, James Streeter, a prosecution expert, testified that he had conducted electrophoresis testing on crime scene evidence. He tested a rock and a tree branch. He also tested evidence seized from the VanZant van. He testified at the pre-trial hearing that there were no national standards for this type of testing, but that he believed the electrophoresis testing for genetic markers was reliable. RT 3:89-119, 611-614.

At the request of the prosecution, the trial judge took judicial notice of the written opinion of the decision of Alameda County Superior Court Judge Byers in People v. Reilly, Case No.96634, that electrophoresis testing was admissible. CT, CSC 4:1129; Clerk's Supplemental Transcript 2-7; RT 3:120-21, 213-14. Streeter testified that the blood stains on the rock, clothing and van curtains could have come from VanZant but not from Petitioner, Barrett or Eckstrom. There was also a dispute about whether blood found on a dress Petitioner contended Eckstrom was wearing when he returned to the campsite and found VanZant had been attacked by the sisters was Eckstrom's or VanZant's. RT 23:4638, 4696-97.

The blood evidence was important in this connection because Eckstrom had admitted to Nebraska authorities that she had blood on her dress because she cut herself, not because it was in the van when VanZant was attacked. RT 22:4409, 20:3832, 3807.

At the time that the trial court held the admissibility hearing, no court in California had upheld the admissibility of electrophoresis testing. At the time of the direct appeal, the California Supreme Court had ruled in one case that the evidence was not admissible under Kelly/Frye standards. People v. Brown, 840 Ca1.3d 512 (1985), reversed on other grounds in California v. Brown, 479 U.S. 538 (1987).

The California Supreme Court held that the testing was properly admitted. 53 Cal.3d 206-08. The court found that electrophoretic testing met the Kelly/Frye standard[25], and that the record before the trial court was sufficient to meet the legal standard. The court did not address Petitioner's confrontation argument.

The process by which the admissibility of the evidence herein was determined was procedurally flawed. By basing its decision on the judicially noticed opinion of another superior court, petitioner was unable to confront and cross-examine evidence the reliability of which he disputed, which that court used to make its evidentiary determination. Because Petitioner was unable to fairly challenge the reliability and trustworthiness of the forensic evidence and the court's ruling thereon, admission under these circumstances violated the Confrontation Clause. Idaho v. Wright, 497 U.S. 805 (1990) [finding incriminating hearsay statements of defendant's daughter to physician inadmissible because statements not reliable or trustworthy].

F. Testimony of Ricky VanZant's Mother (Claim XI)

The first witness at this trial was Ricky VanZant's mother, Lowelene Helms. In an attempt to negate the obvious prejudice of her testimony, the defense offered to stipulate to the matters to which she would testify. RT 17:3149-60. Even the trial judge thought the testimony would be inflammatory, but he permitted it anyway. RT 17:3151-52.

Ms. Helms testified that VanZant was her only child. After her husband died in early 1985, she lent VanZant her van so he could get away. She last spoke to him in the beginning of

---

25. People v. Kelly, 17 Ca1.3d 24, 30 (1976); Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923).

September. Ms. Helms identified a photo of her son and the van from a picture taken before he left home. The prosecutor relied on this evidence at both guilt and penalty phase arguments. RT 24:4809; RT 26:5283.

The state supreme court found that the trial court should have should have required a stipulation to inflammatory evidence. 53 Ca1.3d at 208. The court found there was no reversible error in light of the overwhelming evidence of Petitioner's guilt. 53 Ca1.3d at 209.

The state court's treatment of this issue was incorrect. Where victim impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause permits habeas relief to be granted. Payne v. Tennessee, 501 U.S. 808, 824 (1991). The only purpose for the admission of this evidence was to prejudice the jury. The evidentiary objectives could have been achieved in numerous other ways, as the trial judge recognized. Under these circumstances, the convictions and sentence should be reversed.

G. Forced Disclosure of Defense Witness Information (Claim XII)

The defense called three inmate witnesses who had served time with Avette Barrett to impeach Barrett. Because they were inmate witnesses, trial counsel was forced to disclose their identity to the prosecution before trial. The prosecution was then able to interview the witnesses before they testified. RT 22:4317-20,4360-61, 4375, 4387. This pre-trial disclosure permitted the prosecution to obtain an advantage in cross-examining the witnesses it would not have otherwise had, in violation of the Sixth, Eighth and Fourteenth Amendments.[26]

The state court reached the merits of the claim and found no error. 53 Ca1.3d at 209-10.

State interference with the right to present a defense violates due process. Hicks v. Oklahoma, supra. Here, the only witnesses trial counsel brought to impeach the central guilt phase witness were unfairly subjected to interviews and unfair

---

26. For instance, the prosecutor was able to cross-examine witness Baker about whether she was a devil worshipper. RT 22:4372. This impropriety alone requires reversal. Dawson v. Delaware, 503 U.S. 159 (1992).

cross examination. Under these circumstances, the convictions should be reversed.

V. GUILT PHASE INSTRUCTIONAL ERRORS DEPRIVED PETITIONER OF A FAIR TRIAL. (Claim XVI)

Petitioner challenged the jury instructions given in his case as unconstitutional.

A. The Trial Court's Instructions Failed to Properly Distinguish First Degree and Second Degree Murder.

Murder is either of the first or second degree. Penal Code § 189. First degree murder is either deliberate and premeditated murder with malice aforethought or first degree felony murder. People v. Dillon, 34 Ca1.3d 441, 476-477 (1983). All other murders are second degree. Penal Code § 189. The court's instructions on this issue were confusing and incomplete.

First, the trial court instructed the jury that murder requires either proof of malice or the commission of a felony inherently dangerous to life, but then stated all that need to be proven is that the killing occurred during the commission of a felony. RT 24:4895. This instruction is inherently inconsistent and only makes sense in the context of an instruction which properly distinguishes first and second degree murder. The trial court failed to give such instructions.

CALJIC 8.70[27] informs the jury that murder is divided into these two degrees and if they determine appellant is guilty of murder, they must determine whether the murder is in the first or second degree. This instruction is to be given sua sponte. (See Use Note CALJIC 8.70.)Thus, the jury should have been instructed in accordance with CALJIC 8.70 and instructed that first degree under the prosecution's theory required that the killing be committed during a robbery while second degree

---

27. CALJIC 8.70 reads:

Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine and state in your verdict whether you find the murder to be of the first or second degree.

murder required malice.

Second, Penal Code section 1097 provides if there is a reasonable doubt as to degree of murder, the murder is of the second degree. This rule is embodied in CALJIC 8.71[28] and also to be given sua sponte. (See Use Note CALJIC 8.71.) Although the trial court instructed on second degree murder (RT 24:4896), it failed to give either CALJIC 8.70 or 8.71.

The failure to instruct in accordance with CALJIC 8.71 is a serious error, particularly where, as here, the jury is instructed in accordance with CALJIC 8.72 that as between murder and manslaughter a reasonable doubt is to be resolved in favor of manslaughter (RT 24:4900).[29] The "clearly erroneous implication" is left that the rule requiring a finding of guilt of the lesser offense applied only as between murder and manslaughter and not between first and second degree murder. People v. Dewberry, 51 Cal.2d 548, 557 (1959).

Third, the trial court instructed the jury that murder of the second degree is "the unlawful killing of a human being as the direct causal result of an intentional act involving a high degree of probability that it will result in death, which act is done for a base, anti-social purpose, and with wanton disregard for human life." RT 24:4896. This Court has made it clear that a "finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, is a subjective standard." People v. Watson, 30 Cal.3d 290, 296-297, (1981) (emphasis in original). The use of the highly archaic phrase "wanton disregard for human life" is confusing and fails to convey the subjective requirement that the

---

28. CALJIC 8.71 reads:

> If you are convinced beyond a reasonable doubt that the crime or murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree.

29. The trial court instructed the jury that: "If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime was murder or manslaughter, you must give the defendant the benefit of such doubt and find it, to be manslaughter rather than murder." (RT 24: 4900.)

perpetrator consciously appreciate and disregard the danger to human life.

Fourth, evidence of provocation which is insufficient to reduce a homicide from murder to manslaughter may nevertheless reduce it from first degree to second degree. People v. Valentine, 28 Cal.2d 121, 136-42. This concept is embodied in CALJIC 8.73 which provides:

> When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree.

Although requested by appellant (CT 8:2066), this instruction was not given. RT 24:4730. This was error.

The jury was instructed that murder can be reduced from murder to manslaughter upon the ground of a sudden quarrel or heat of passion. RT 24:4898. Where the provocation is insufficient to reduce a murder to manslaughter, it may nevertheless reduce it from first degree to second degree murder.

Clearly, there was sufficient evidence to warrant the provocation instruction given by the trial court in light of Morris' testimony that Barrett told him VanZandt attempted to rape her. RT 23:4597.[30] Based on this evidence, the jury could have found that even if Morris inflicted either the blows in the van or outside, he was provoked by rage, not the intent to rob, and while it was insufficient to constitute manslaughter it was murder of the second rather than first degree.

A jury is entitled to decide what type of homicide appellant had committed based on all the evidence regardless of the theories relied upon by the parties. People v. Wickersham, 32 Cal.3d 307, 329-330 (1982); People v. Johnson, 210 Cal.App.3d 870, 879-880(1979). While they were instructed

---

30. It is not clear that provocation must be caused by the victim.(See People v. Sprulin (1984) 156 Cal.App.3d 119, 125-126 [where Court of Appeal held as a matter of first impression that provocation must emanage from the victim].)

that second degree murder was a possible disposition, appellant was entitled to have the jury fully instructed on that crime "to ensure reliability in the fact finding process." People v. Geiger, 35 Cal.3d 510, 520 (1985). The failure to do so, particularly when the clarifying instruction was requested by the defense, deprived appellant of due process. See Id. at 519-20, 526.

Clearly, the state has no "legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense." (Id. at 519.) The court's instructions failed to inform fully the jury concerning the lesser included offense of second degree murder and thus Petitioner's conviction must be reversed.

B. The Trial Court Erred in Refusing to Instruct That The Felony Murder Rule Does Not Apply To Assault With A Deadly Weapon.

The felony murder rule does not extend to cases where the felony is an integral part of the homicide. People v. Ireland, 70 Ca1.3d 522, 539 (1969). Thus, where the homicide, as here, could have been committed as a result of a felonious assault, the felony-murder rule is inapplicable. In accordance with these authorities, appellant requested that the jury be instructed that:

> The first degree felony murder rule is not applicable to a homicide resulting from the perpetration or attempt to perpetrate the crime of assault with force likely to produce death or great bodily harm. CT 8:2185.

The trial court refused this instruction. RT 24:4729. This, too, was error.

Notwithstanding the trial court's failure to give this instruction, defense counsel argued such a limitation applied. RT 24:4815. Argument of counsel, however, is no substitute for instructions. Carter v. Kentucky, 450 U.S. 288, 302 (1981).

This error cannot be deemed harmless. As noted above, the jury could have found, as defense counsel argued, that Petitioner did not form the intent to steal until after the victim

was assaulted. RT 24:4815-16.[31]

C. The Trial Court Erred In Giving Irrelevant Instructions.[32]

Although no one contended that the homicide was involuntary manslaughter, the jury was instructed as to that crime. RT 24:4896. Similarly, there was no reason to instruct on other extraneous classes of homicides. RT 24:4894. Although these instructions are legally correct *in* the abstract, they served no purpose in the case at bar and it was error to give them.

D. Conclusion

In a capital case, it is essential that the jury be clearly and fully instructed as to all possible classes of homicides which have some support in the evidence. It is not enough to mention each in a confusing and incomplete manner. Rather, the instructions must be complete and accurate so as to assure a reliable guilt determination.

Indeed, in a capital case, instructions on lesser included offenses supported by the evidence are required by the Eighth Amendment to the federal constitution. Beck v. Alabama,447 U.S.625, 637-38 (1980). In Beck, the United States Court held that the unavailability of such instructions enhanced the risk of an unwarranted conviction by putting the jury to an all or nothing choice. Id., at 635-38. "Such a risk cannot be tolerated in a case where the defendant's life is a stake." Id., at 637.- Moreover, the failure to give such instructions violates the defendant's Sixth Amendment right to a jury trial on all materials issues presented by the evidence. United States v. Unruh,855 F.2d 1363, 1372 (9th .Cir. 1988).

The instruction in the case at bar did not afford Petitioner these rights. Consequently, his convictions must be reversed.

The California Supreme Court rejected Petitioner's claims. 53 Ca1.3d at 211-13. It found that the omission of instructions on murder that told the jury it had to state the degree of murder

---

31. Compare People v. Ramkeesoon (1985) 39 Cal.3d 346, 352, where evidence would support a finding that defendant formed the intent to steal after the victim was dead.

32. Claim XX

in its verdict and that the jury was required to return a second degree verdict in the event of reasonable doubt on degree of the homicide was not error because he advanced no theory under which a second degree murder verdict might have been found.[33/] The supreme court found the remaining instructional errors not prejudicial.

Erroneous and contradictory instructions defining the elements of a crime may violate due process. Suniga v. Bunnell,998 F.2d 664 (9th Cir. 1993) [erroneous instruction on non-existent theory of felony-murder violated due process; Baldwin v. Blackburn, 653 F.2d 942, 949 (5th Cir. 1981) [misleading and confusing instructions under state law may violated due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"]. These authorities establish that the confusing and imprecise homicide instructions given Petitioner's jury have caused an unreliable guilt phase result.

Moreover, the jury was not fairly permitted to choose between degrees of the offenses, and this alone constitutes a reversible due process violation. Finally, deprivation of a theory of defense instruction constitutes reversible error in the context of this case.

---

33. Trial counsel's ineffectiveness with respect to this issue is treated below. There was potentially a plausible theory of second degree murder however. Had Petitioner killed VanZant in a rage following discovery of an assault on his girlfriend Avette Barrett, such proof could have reduced his culpability to second degree murder or even manslaughter. Additionally, Petitioner's long standing organic brain damage and related mental impairments might have reduced the degree of homicide as well, or negated specific intent, had trial counsel investigated and presented this evidence. The state court's treatment of this issue establishes the prejudice from the failure to investigate and marshal this evidence on Petitioner's behalf at guilt phase. Petitioner was entitled to instruction on lesser included offenses if the evidence supported it. Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

VI. ERRORS IN THE JURY SELECTION PROCESS REQUIRE THAT PETITIONER'S CONVICTIONS AND DEATH SENTENCE BE SET ASIDE.[34]

Several errors of constitutional magnitude occurred during jury selection in this case. The state court found all Petitioner's complaints to be without merit. 53 Cal.3d at 183-86. The state court was incorrect.

The wrongful exclusion of even a single juror for cause cannot be considered harmless error. Gray v. Mississippi, 481 U.S. 648, 672 (1987) (Powell, J. concurring). Here, the prosecution improperly used its challenges to remove death penalty skeptics from Petitioner's prospective jury. Pursuant to Gray, this requires reversal.[35]

VII. LACK OF PRE-TRIAL NOTICE TO THE DEFENSE OF AGGRAVATING EVIDENCE REQUIRES REVERSAL OF THE PENALTY JUDGMENT.[36]

Since Petitioner filed his amended federal petition, Gray v. Netherland, ___ U.S.___, 117 S.Ct. 2074 (1996), has been decided. It appears to foreclose this claim.

VIII. INTRODUCTION OF FACTS UNDERLYING PETITIONER'S PRIOR CONVICTIONS AT PENALTY PHASE WAS UNCONSTITUTIONAL.[37]

Petitioner's counsel stipulated to the admissibility of Petitioner's prior convictions, despite the fact that they admitted they had not investigated the priors. RT 4949. Had trial counsel investigated the prior convictions and Petitioner's related life

---

34. Claims XXV & XXVI

35. These jurors were: Blount (RT 5:621; 16:3055); Wilson (RT 6:965; 16:3054); Rivera (RT 9:1623; 16:3053); Leammle (RT 10:1766; 16:3060); Chard (RT 11:1946; 16:3061); Orman (RT 13:2492; 16:3060); Lane (RT 16:2917; 16:3058).

36. Claim XXVII

37. Claim XXVII

long organic brain damage and impairment, they would have moved to exclude the priors as having been unconstitutionally obtained.

Admission of prior convictions as aggravation which are later determined to be invalid violates the Eighth Amendment. Johnson v. Mississippi, 486 U.S. 578 (1988).

The failure to investigate this aggravating evidence constitutes prejudicial ineffectiveness. Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987). See also discussion in Sections XI & XII concerning Petitioner's incompetence to aid and assist counsel and trial counsel's ineffectiveness in failing to investigate Petitioner's mental health history.

IX. THE FACTORS IN AGGRAVATION WERE IMPROPERLY INFLATED.[38]

See below, Arguments XIII, XIV, and XV.

X. PENALTY PHASE INSTRUCTIONS WERE UNCONSTITUTIONAL.[39]

See Argument XV, below.

XI. PETITIONER WAS INCOMPETENT TO AID AND ASSIST TRIAL AND APPELLATE COUNSEL.[40]

Petitioner has suffered throughout his lifetime from several chronic and debilitating medical and psychiatric conditions which severely impair both his cognitive functioning, his often overwhelming emotional anxiety, and his ability to control impulsive and irrational behaviors. His conditions are severe and longstanding, causing chronic physical pain, profound mental confusion and disorientation, frequent memory lapses, and seizures resulting in loss of consciousness. These disabilities are greatly exacerbated under stress. His impairments have set him apart since early childhood, rendering him vulnerable to ridicule and rejection, humiliation and shame,

---

38. Claim XXX

39. Claims XXX, XXXIV, & XXXV

40. Claim XXXVIII

physical and sexual victimization, and a sense of self-loathing. They are compounded by the inevitable confusion, fear and guilt associated with blackouts, memory lapses, and his own inability to explain or even recall critical events. Not surprisingly, his attempts to overcome, or at least mask, his deficits have often led him to accept responsibility for the misdeeds of others. Sadly, these gestures have repeatedly had the opposite effect -- Bruce Morris's vulnerabilities became even more apparent to manipulative peers. Petitioner has historically been the unwitting "dupe," left "holding the bag" and uniquely ill-equipped to protect himself or avoid potentially disastrous situations.

A. Petitioner's Incompetence and the Claims Raised in These Proceedings.

Petitioner's ability to focus his attention, to engage in meaningful or even coherent conversation for any period of time, and to recall and relate even simple facts or experiences is so impaired that he was unable to assist counsel at every critical phase of his capital trial and appeal. Specifically, Petitioner asserts that: (1) Petitioner was mentally incompetent to aid rationally and assist counsel in developing and presenting a defense at trial; (2) Petitioner was similarly incompetent to aid and assist appellate counsel on his direct appeal; (3) Petitioner was mentally incompetent to knowingly, intelligently and/or voluntarily waive any constitutional rights; and (4) Petitioner lacked the mental capacity to accurately recall and relate the substance of any statements, admissions, confessions or testimony given during these proceedings, nor was he capable of comprehending Miranda warnings or other admonitions. Petitioner also raises related claims that (1) trial counsel' s failure to investigate Petitioner's mental state and medical history, as well as his failure to present that history to the court, deprived petitioner of his right to the effective assistance of counsel; and (2) the trial court's failure to declare a doubt in this regard, or to inquire sua sponte as to petitioner's mental condition, violated petitioner's due process rights.

Respondent glibly describes petitioner's competency-related claims as "frivolous." A criminal defendant's right not to be tried while mentally incompetent has been zealously and consistently protected by the federal courts. See e.g., Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966); Drove v.

Missouri, 420 U.S. 896 (1975); Godinez v. Moran, 113 S.Ct. 2680 (1993); United States v. Lewis, 991 F.2d 254 (9th Cir. 19983); Moore v. United States 464 F.2d 663 (9th Cir. 1972). In Moore, the Ninth Circuit reiterated that the Constitution ". . . requires an evidentiary competency hearing any time there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial""

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence . . At any time such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue . . . .

Moore v. United States, supra at 666 quoted in Tillery v. Eyman, 492 F.2d 1056, 1059 (9th Cir. 1974). Moore, Tillery, and the line of cases which followed made clear that the issue is not whether conflicting evidence exists regarding petitioner's competency. In Tillery, a unanimous panel acknowledged the very dispute which necessitates an evidentiary hearing:

> Although there was information indicating that Tillery was in fact competent, such conflicting evidence can only be resolved by an evidentiary hearing.

Tillery v. Eyman, supra at 1059.

B. Petitioner's Claims Are Supported By Extensive Historical Facts And Extensive Documentation Covering Several Decades.

1. Respondent Dismisses The Underlying Facts As "Nothing More Than Conclusory Allegations" And "Bald Assertions," Supported By "No Evidence."

Respondent asserts that petitioner ". . . presents no evidence to support his other claim that he actually was incompetent."(Motion for Summary Judgment at p..)Such a statement can only be based on his failure to read the Petition itself, or on an ill-informed notion of what constitutes "evidence" for purposes of a summary judgment motion. Petitioner sets forth in specific detail the clinical deficits and impairments which have afflicted Petitioner throughout his life.

These are clearly described in Paragraphs A-E of Claim XXXVIII in Petition, including "a long history of depression, frequent and severe headaches, interruptions of consciousness, and organic brain damage," as well as "memory impairments, learning disabilities, and neurological deficits . . . ."(Petition at p. 81.)These impairments were further exacerbated by chronic pain, physical weakness, sleep deprivation, and confusion caused by medical conditions, for which he requested, but was denied, appropriate treatment. Moreover, Petitioner clearly articulates the effects of this multiple and cumulative impairments on his ability to assist counsel in any meaningful way:

> His physical discomfort diverted his attention and energy from his pre-trial and trial proceedings as he sought relief from . . . [his medical conditions].
> . . . His behavior at trial was inappropriate at times. Petitioner was unable to focus and maintain his attention of preparing and presenting a defense to the charges against him. He was easily distracted by insignificant detail and preoccupation with his mental disturbances and impairments . . . He was unable to hold in check his impulses and emotions during stages of the proceedings. Petitioner could not mentally attend to the events in pre-trial and trial proceedings, assist in the development of strategy, or make rational decisions about his defense. These problems continued on appeal.

(Petition at pp: 81-82.)

2. <u>Voluminous Records And Documentary Evidence Reveal That Petitioner Suffered Multiple Medical And Psychiatric Conditions Which Severely Impair His Cognitive And Volitional Functioning, Even As A Young Child.</u>

Early hospital and school reports reveal a range of cognitive and social impairments. It was noted that his mother suffered a "near miscarriage at 6 months," although Bruce was a full-term birth. In kindergarten, a Stanford-Binet test revealed significant deficits in visual-motor skills; by first grade, he was placed in special education -'asses. In 1966, clinicians recommended that Bruce be sent to nrapa State Hospital for psychiatric observation; he was also referred to a Short-Doyle

Clinic, presumably, for mental health intervention.[41] This coincided with a period of family upheaval and his father's arrest.

Unlike many children from abusive or neglectful homes, Bruce Morris came to the attention of local authorities when his father was charged and convicted of molestation. As part of their investigation of those offenses, welfare workers became concerned about Bruce's physical development and well-being: "Bruce's teacher and school nurse . . . were concerned over absence of an, kind of continuing support for the family."The nurse attempted to secure a statement from the family doctor '1 . . . to verify Bruce's need for psychiatric treatment." His teacher documented his "nervous energy" and his difficulty in sitting still for any length of time."They recommended that he receive "some kind of tranquilizer" to calm him down. Bruce Morris was 10 years old at the time. Reports from that period reveal salient indicators of severe emotional distress:

> Father would like to blame start of everything on Bruce's experience with a kindergarten teacher who abused him by slapping him around. Parents filed a complaint with D.A. He was held back in 1st grade and by 2nd grade -- school referred parents to Dept. of Mental Hygiene for help . . . .
>
> Child was placed on Ridlin [Ritalin][42] 15 gr. in the morning and 5gr at lunch. Parents guessed it was for depression and wondered whether he needed something to calm him down rather than stimulate. Child is still on medications. . . .

Just one year before, Bruce Morris' father had been convicted of molesting two of his nieces while they were living

---

41. The Short-Doyle Act ". . . is intended to organize and finance community mental health services for the mentally disordered . . . through locally administered and locally controlled mental health programs. .(California Welfare & Institutions Code, §5600.)To be eligible for Short-Doyle services, a child had to be at risk " . . . of becoming institutionalized because of a mental disorder . . ." (§ 5651.1(b).)

42. Ritalin is a central nervous system stimulant often prescribed for hyperactivity in children. The dosage prescribed for Mr. Morris at this time is considered the maximum advisable daily dose for ongoing use in young children.

in the Morris home. It was soon after that Bruce was placed on medications; by third grade he was attending regular psychological counseling sessions.

A note from 1967 indicates that Bruce Morris, then 11 years old, was "able to read to some degree," but had troubles with "letter reversals -- difficulties with letter sizes and form." He also needed to "work on motor coordination, etc.. -- was not ready to work on perceptual tasks." He was referred to a neurologist after a suggestion of "Cerebral Dysfunction"[43]; the clinical impressions supporting the referral were: "(1) Mild Cerebral Dysfunction; (2) Question of Mixed Dominance; and (3) Emotional Immaturity & Behavior Problem." That evaluation was apparently never completed because of the father's unavailability for historical information. Progress notes document that Bruce suffered anger and aggression as a result of ". . . failure experience related to perceptual problems."(Sacramento County Hospital records, 1967.)

The signs and symptoms noted above all indicate an organic impairment. The historical data indicates that Bruce Morris, in addition to struggling with organic deficits, was subjected to a chaotic and, at best, inappropriate family environment. Impaired children are often far more vulnerable to the long-term effects of neglect, rejection and scapegoating. A 1967 psychiatric evaluation confirms that at il years old, Bruce Morris had almost no self-esteem and several prominent physical abnormalities. He was overweight, and often the source of ridicule by other children. The evaluator noted that "his ears are quite prominent and there is a noticeable quality of facial asymmetry."[44] Dr. Swanson concluded that Bruce's difficulties were likely the product of organic and emotional factors. Under contributing organic factors, she notes the possibility of "some deleterious Central Nervous System effects" resulting from measles in 1960; earlier documented impairments in his Visual-Motor skills; clinical impressions of Mild Cerebral Dysfunction; and history of hyperactivity, short attention span, low frustration tolerance -- "symptoms

---

43. Cerebral Dysfunction refers to a deficit in the cerebrum, that part of the brain which controls many of the higher mental functions, including perception, motor coordination, and behavioral responses.

44. Facial asymmetries are among the most salient indicators of brain damage and impaired cognitive abilities.

consistent with . . . Mild Cerebral Dysfunction with either associated hyper-conetic (sic) syndrome[45] or secondary emotional problems."Moreover, "[t]he exacerbation of Bruce's problems with his father's arrest, etc. is noted."Also noted were rejection from an early age, anxiety, low self-esteem, and school failure. Her diagnoses were:(1) Adjustment Reaction of Childhood with Neurotic Traits and Conduct Disturbance;[46] and (2) Possible Mild Cerebral Dysfunction with questions of perceptual problems. She recommended continued medication with Ritalin, suggested consideration of amphetamines or thiroizadine as well. She also recommended further psychological testing and inquires into available psychiatric services for "significant internalized problems." (Psychiatric Evaluation by C.E. Swanson, M.D.) Bruce Morris was denied access to Short-Doyle services because he was too young. Instead, he was seen at an out-patient clinic, where he was diagnosed with "Hyperactivity [secondary] to MBD [Minimal Brain Damage]" and prescribed Phenobarbitol.[47]

Mr. Morris has suffered seizures and chronic headaches for his entire life. When he was 20 years old, he was transferred from the Sacramento County Jail to U.C. Medical Center for treatment for apparent seizures. The intake note reported " . . . head trauma and onset of seizures in early 19777.11 His diagnoses were:(1) Seizure Disorder -- ? Idiopathic ? Post-traumatic; and (2) Probable seizure tonight." It was noted that his Dilantin[48] and Phenobarbitol levels were down. An examining physician concurred:"Seizure [with] LOC [loss of

---

45. hyperkinetic Syndrome is more commonly known as Attention Deficit Disorder.

46. Adjustment Disorders are manifested by the development of "clinically significant emotional behavioral symptoms in response to an identifiable psychosocial stressor or stressors." (Diagnostic and Statistical Manual of Mental Disorders (4th edition ["DSM-IV"], (American Psychiatric Association 1994), p. 623.)

47. Phenobarbitol is a barbiturate (sedative) used to treat anxiety or as an anti-convulsant used to treat some forms of epilepsy.(Rothenberg & Chapman, Dictionary of Medical Terms (2nd edition) (1989), p. 349.)

48. Dilantin is an anti-convulsant drug used in the treatment of epilepsy. (Rothenberg & Chapman, supra at 128.)

consciousness]." Later that year, Mr. Morris was again admitted, this time with an admitting diagnosis of the "Poss[ible] Dilantin toxicity" but a discharge diagnoses of:"(1) Seizure disorder; and (2) Subtherapeutic [Dilantin] level." His Dilantin level was increased to 400 mg/day. His history noted that he had experienced "bilateral throbbing frontal headaches" for one month, and that he suffered a head trauma in 1975. Later that year, he was admitted after having four seizures over the course of a single week, despite the Dilantin. Dr. Warren notes no reported family history of epilepsy, but "[he] was knocked out in '74 or '75 for unknown period . . . .Onset [with] dizzy & then blacks out. Has lat[eral] nystagmus[49] both directions. Two subsequent examinations in 1978 confirmed a seizure disorder and emphasized the need for medications (Dilantin and Phenobarbitol) in the jail. Confirming symptoms included "endpt & upgage nystagmus." The examining physician noted that he was not receiving the Dilantin while in jail. He was subsequently admitted for "possible seizures." The intake not stated: "Was observed . . . to appear to be having a G.M. [grand mal] seizure. Had similar problem in Nov . . .." In 1977 and during the years following, Mr. Morris was repeatedly diagnosed with "Status Epilepticus,"[50] "Seizure Disorder," "Possible Seizure Disorder," and "New Onset Seizure Disorder, Status Post Epileptic."He was treated with Dilantin, Phenobarbitol, oxygen and glucose injections. Clinicians observed and documented respiratory difficulty, tonic contractions, dizziness, blurred vision and severe headaches. He is described as "cyanotic[51] and unresponsive" while seizing, frequently disoriented and confused.

---

49. Nystagmus refers to an involuntary rhythmic eyeball movement, frequently associated with brain disorders.

50. Status Epilepticus" is a condition in which one experiences "continuing attacks of epilepsy without intervals of consciousness; it can lead to severe brain damage and death."

51. A discoloration of the skin occurring when oxygen in the blood is sharply diminished.

3. CDC[52] Records Themselves Confirm The Existence Of Significant Impairments In Petitioner's Functioning.

Medical records maintained by CDC during petitioner's incarceration at Vacaville report a history of seizures and maintained him on high does of Dilantin, the anti-seizure medication he had taken for years. A 1978 note reports a closed head injury in 1975 or 1976 resulting in loss of consciousness, as well as ongoing headaches. Several days earlier, staff witnessed what appeared to be an epileptic convulsant seizure. An abnormal EEG was interpreted as "certainly . . . compatible with generalized seizure disorder." The impression at that time was "Seizure Disorder - Idiopathic vs. Post-traumatic."[53] Constant headaches and several additional seizure were noted in the following months. Petitioner continued being seen at Seizure Clinic until his release from Vacaville in 1979.

In 1982 and 1983, CDC records reflect ongoing gastro intestinal problems and chronic headaches. He is repeatedly described as "obese." In 1985, petitioner was admitted to a psychiatric unit. Soon afterward, he reported "vertigo -& chills," and medical staff observed that "[h]e moves in a deliberately clumsy fashion." A note from 1986 indicates that Mr. Morris re experienced the seizure documented years earlier, but eh records are minimal and dismissive:

> 3/24/86 - 1900 - Pt brought in via gurney from 4A [with] c/o [complaint of] being unresponsive to officers at count - Pt seemed to be somewhat confused ? . . . Review of records reveals similar incidents in the past [with] a somewhat vague & questionable H/O [history of] seizures.

Petitioner was not evaluated by a physician at that time.

---

52. CDC = California Department of Corrections

53. "idiopathic" means that no obvious cause can be identified, as is true in approximately 750 of epileptics. "posttraumatic epilepsy," however, is characterized by seizures beginning as late as several years after a physical trauma. This condition " . . . follows about 10% of severe closed head injuries and 40$ of penetrating head wounds." (The Merck Manual of Diagnosis and Therapy (16th edition) ["Merck's Manual"](1992), pp. 1436, 1461.)

4. Petitioner's Disabilities Were Confirmed By Qualified Experts During The Period Of His Arrest And Trial.[54]

In 1986, petitioner was referred to Sidney J. Kurn, M.D., a neurologist who performed an EEG topography and issued a report dated May 20, 1986. The stated reason for that referral was:

> Head injury, 1976 or 1977 --?, left temporal area, another head injury 1977, hit above left eye with pipe. Daily headaches, possible seizures . . . .

Dr. Kurn's computerized analysis found the "topographic brain map" to be abnormal in several significant respects, leading him to the following impressions of Mr. Morris' brain functioning:

> Moderately abnormal . . . topography due to multifocal abnormalities of the background activity. Notable in increased energy in the slow frequency bands in the left frontal and left posterial temporal region and abnormal attenuation of activity in higher frequency bands in the right frontotemporal region. This is compatible with multifocal electrocerebral dysfunction and is suggestive of a possible coup contre coup injury . . . . The right frontal cerebral dysfunction is highlighted in the auditory evoked potential. The dysmorphic AEP is compatible with abnormal auditory processing.

Dr. Kurns's findings are critical to our understanding of petitioner's mental state. The abnormalities he identified largely affected petitioner's frontal lobes, that part of the brain which." . . . influence[s] 2 principal behavioral functions: learned motor activity and the planning and organizing of future expressive behavior." Also affected were the temporal lobes: "Patients with . . . damage to the right temporal lobe commonly lose acuity for nonverbal auditory and other memory, including that of spatial configurations."[55]

---

54. And, pursuant to Jackson v. Virginia, 443 US. 307 (1979), given this evidence and the evidentiary errors discussed concerning the guilt phase, the evidence was insufficient to convict Petitioner of murder. See Claims XIII & XVII.

55. Merck's Manual, supra at 1394-1395.

C. Respondent Mischaracterizes The Expert Testimony Presented At Trial And Misconstrues The Severity Of Petitioner's Impairments.

Respondent asserts that the trial court was unpersuaded by testimony regarding petitioner's "borderline personality, problems" and found that petitioner did not suffer from an mental disease. This misconstrues the substance and significance of that testimony, as well as the significance of specific diagnoses or conditions. "The medical condition or classification of defendant's illness . . . does not end the [competency] inquiry." United States v. Makris, 535 F.2d 899, 907 (5th Cir. 1976). Respondent correctly notes that Dr. Jacqueline Carroll believed petitioner's intellectual condition to be "within the-normal range."Whether or not such a statement is accurate, intelligence (or performance on standardized tests) is in no way a measure of competency to stand trial.

Dr. Carroll also testified that in many respects, petitioner ". . . didn't see reality the same way most people do." (RT 5096.)She also testified that her neuropsychological testing was consistent with that of Dr. Kurn -- petitioner suffers disturbances of the brain located in the frontal and temporal lobes. Mr. Morris' organic impairments affect his ability to make decisions, to plan, to grasp the consequences of his actions. Dr. Carroll classified petitioner's condition as mild to moderate brain damage (or brain dysfunction), which she believed to be chronic, dating as far back as petitioner's early childhood. This condition is exacerbated by impairments in his ability to concentrate, a high degree of distractibility, heightened impulsivity, and strong feelings of personal inadequacy. Moreover, petitioner suffers, according to Dr. Carroll's test results, from a "significant" case of Borderline Personality Disorder, a condition which can manifest itself in psychotic symptoms:

> It's basically a disorder of the self, in the sense these are individuals who have a hard time maintaining a consistent and reliable sense of themselves in part because of a -- usually an abusive and/or chaotic childhood. And they often will have brief psychotic episodes.

(RT, 5100.) Petitioner's condition is also characterized by depression, anxiety, mental confusion and paranoia. Dr. Carroll concluded that petitioner had difficulties with impulse control

and learning from his mistakes. Like many with Borderline Personalities, he had trouble getting along with people and was overly dependent on people, to the point of being very easily influenced. She opined that petitioner could distinguish between right and wrong, but that his ability to conform his conduct was impaired by his chronic brain damage. She attributed his behavior to a combination of his disturbing childhood and organic brain dysfunction. RT 5108.

Borderline Personality Disorder is a serious mental condition. The most authoritative test on psychiatric disorder states that "[t]he most common pattern is on or chronic instability in early adulthood, with episodes of serious affective and impulsive dyscontrol."[56] Contrary to Respondent's contention, this condition is a chronic and potentially devastating mental disease. Dr. Carroll was not asked, nor did she render an opinion regarding, the cumulative affects of chronic brain damage and Borderline Personality Disorder on petitioner's competence to stand trial.

Dr. Albert Globus also testified at trial, noting that even after his initial interview with petitioner, he saw evidence of brain damage and recommended neurological testing:

> He didn't act logically and rationally within the variation one sees in normal human behavior so that I - I felt that the history was strongly suggestive of brain damage of a mild to moderate nature of long duration, perhaps since birth, certainly from his early years.

RT 5135. Dr. Kurn's computerized EEG, done at Dr. Globus' request, confirmed "diffuse abnormalities in the brain," particularly in the frontal and temporal regions. Dr. Globus' findings, supported by the Kurn report, were consistent with those of Dr. Swanson's 1967 evaluation: petitioner's impairments manifested themselves in his inability to organize his though processes and understand the consequences of his behavior. He, too, noted that petitioner's brain damage may well have increased his feelings of rejection and frustration, thereby heightening pre-existing emotional distress in the form of anxiety and low self-esteem. RT 5152.

The degree of dysfunction related to diffuse brain damage is strongly influenced by the environment in which a disabled

---

56. DSM-IV,p. 652.

child develops. Dr. Globus testified that, despite the paucity of family history he was provided, it was evident that petitioner was both a scapegoat and "a tool" within the household. The Morris family was referred for psychiatric counselling on several occasions but, for whatever reason, they did not follow through.

The fact that Ritalin was apparently effective in organizing and focusing petitioner's thinking as a child strongly suggested that he did, in fact, suffer brain damage; the effect of Ritalin on a normal brain would be quite different. Nonetheless, Ritalin does not cure brain damage; his inability to process information will persist into adulthood. A treatment plain of the type outlined by Dr. Swanson might well have helped petitioner cope with the effects of his disability, but that intervention was not provided. RT 5167. Instead, petitioner self-medicated with speed and other stimulant, which initially had essentially the same effect as Ritalin, but also caused paranoia and lead him to misperceive social cues, further disabling him.

Dr. Globus diagnosed petitioner with 91) Adjustment Disorder with depressed mood; (2) amphetamine or similarly acting sympathomimetic drug abuse, in remission; (3) atypical organic brain syndrome; and (4) attention deficit disorder, residual type. RT 5171-72. Contrary to Respondent's assertion, Dr. Globus also testified that although petitioner's IQ appeared normal, the variabilities in his subtests were not normal. Again, Respondent dismisses these findings with a simple (and Misleading)reference to petitioner's IQ. Dr. Globus did not render a professional opinion regarding petitioner's competency.

D. The Evidence Available At Trial And Petitioner's Documented History Should Have Raised Serious Doubts Regarding His Mental Competency.

Petitioner's history includes all the factors and symptoms characteristic of chronic mental impairments. His documented history is rich with salient clinical indicators, the manifestations of which should have been apparent not only to petitioner's counsel, but to the court as well. Mr. Morris had been diagnosed with a variety of seizure disorders, including epilepsy; numerous forms of organic brain dysfunction; learning disabilities and attention deficit disorder; Axis I adjustment reactions; amphetamine abuse; and Borderline Personality Disorder. His medical and correctional records also

frequently note anxiety, depressed moods, low self-esteem, blackouts, memory lapses, dizziness, and chronic headaches. He had a known history of numerous closed head injuries resulting in loss of consciousness. Evaluators had observed since childhood that his motor skill were impaired, his gait was unusual, and he had marked facial asymmetries. These factors were salient enough that several physicians ordered psychological, neuropsychological and neurological assessments. Petitioner was laced in special education classes for most of his childhood, and referred repeatedly for psychiatric observation and/or treatment. He was medicated throughout his childhood with Ritalin, Dilantin and Phenobarbitol. This history should have suggested that petitioner's cognitive functioning was compromised by both organic and psychiatric defects.

The federal courts have consistently held that failure to investigate and present mental health defenses and issues constitutes ineffective representation and deprives the criminal defendant of a fair trial. Information that an individual has been referred to psychiatric counselling should alert both counsel and the court to the possibility of mental instability affecting competency, sanity and mitigation evidence. A history of irrational behavior, when known by counsel and/or the court, is "sufficient to require further inquiry notwithstanding [the defendant's] demeanor at trial," as are prior diagnoses of 'borderline mental deficiency and chronic anxiety reaction. . .' Drope v. Missouri, 420 U.S. 162, 172 n. 9, 179 (1975). The same court held that a recommendation for psychiatric treatment 10 years prior to trial was also sufficient to trigger further investigation. In Godinez v. Moran, 113 S.Ct. 2680 (1993), the United States Supreme Court found that the trial court erred in failing to question a defendant regarding the type, dosage and effects of medications which had been brought to his attention, two of which were Dilantin ("an anti-epileptic medication that may cause confusion") and Phenobarbitol. The Ninth Circuit recently noted counsel's obligation to provide its experts with all available evidence of mental illness, including tendencies toward impulsivity and the fact that the defendant was extremely gullible and easily manipulated by others. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

Self-medication with drugs and alcohol, chaotic and violent childhoods, borderline intellectual functioning, and even inconclusive EEG results suggesting possible abnormalities

have all be found to put counsel and the courts on notice that further investigation of a defendant's mental condition is necessary. See Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Chavez v. United States, 656 F.2d 512 (9th Cir. 1981); Profitt v. Waldron, 831 F.2d 1245 (11th Cir. 1987); Lokos v. Capes, 625 F.2d 1258 (5th Cir. 1980). "It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems." Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990).

XII. INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.[57]

Respondent's characterizations of petitioner's claims are misleading and inaccurate, misstating not only the facts of this case, but also asserting a standard of representation by defense counsel which is so inadequate as to be meaningless. Petitioner sets forth in significant detail the numerous failures and omissions committed by counsel, both at trial and on direct appeal, which resulted in a level of representation which was constitutionally inadequate. These errors were critical. Counsel's failure to both investigate and present crucial evidence in both phase so petitioner's trial deprived him of viable and meritorious defenses that would literally have saved his life. The cumulative effect of counsel's failures denied him of even the minimal representation to which he was constitutionally entitled.

A. Petitioner's Trial Counsel Failed To Investigate And Present A Full And Reliable Family History.

Petitioner alleges that counsel failed to investigate and present information regrading petitioner's family history at both the guilty and penalty phases of his trial. Respondent refutes that allegation, claiming that family history information was indeed presented at penalty phase. Although there was testimony regarding both the relevance of family history data and its possible impact on petitioner's mental status assessment,

---

57. Claim XXXVII. See also discussion regarding state habeas claims which were defaulted below, argument XVI.

the bulk of that testimony concerned what both Dr. Carroll and Dr. Globus described as " . . . a paucity of information regarding the parents early in present family interactions, et cetera, which seem to reflect the parents' tendency to avoid these areas and use denial . . . ." RT 5151. Much of Dr. Carroll's historical information was taken from earlier evaluation by Dr. Swanson. She notes that ". . . he came from a family where there was considerable verbal and physical abuse and a lot of tension in the family . . . . It was my impression that his father was very rigid and controlling in the family. RT 5092, 5094. That report, in turn, referred to ". . . some fear of father and concern about father's self control," but also noted that [d]espite the numerous contracts and reports reviewed, there is really a paucity of information about the parents . . . ."

This minimal information raises the specter of a less-than-ideal childhood without describing the critical details of petitioner's early experience or, more importantly, without providing the jury with a proper context in which to view petitioner's development. Drs. Carroll and Globus agreed that the effects of organic brain damage vary according to the degree of support and attention provided in the home. We know that petitioner's father was convicted of sexual offenses when petitioner was only 10 years old, and we know that those offenses took place in the Morris home. These is also speculation that petitioner's mother rejected him early on, and that she thwarted efforts to obtain proper therapeutic intervention for her son's cognitive and behavioral difficulties. These facts were neither developed nor integrated into the mental health testimony. A full and accurate mental health assessment was therefore precluded. See Kenley v. Armantrout, 937 F.2d 1298 (8th Cir. 1991).

Counsel's failure to investigate and present life history information also adversely affected the presentation of guilt phase. One of the hallmarks of organic brain damage is the affected. individual's inability to make rational and independent decisions. Even minimal brain dysfunction often renders one vulnerable to manipulation by others, especially those with a history of dishonesty. Equally as significant are the symptom of seizure disorders, for which petitioner was treated for most of his adolescence and young adulthood. Blackouts, disorientation, and memory lapses make these individuals uniquely unreliable as reporters of information.

Many learn to mask these deficits by accepting as truth any

information supplied by others which aids them in explaining periods for which they have no actual memory. This phenomenon is known as confabulation. It is often the basis of false confessions and inconsistent statements. The reliability and accuracy of any statement or account provided by a person suffering from a seizure disorder cannot be determined without a thorough understanding of his symptom and treatment history. This was neither obtained nor presented at petitioner's trial, leaving him prey to his less disabled, manipulative co-defendants, both of whom has established histories of dishonesty and premeditated criminal behavior.

In a case with striking similarities, the Eleventh Circuit granted habeas relief. In Middleton v. Duaer, 849 F.2d 491 (11th Cir. 1988), trial counsel failed to conduct an adequate investigation into the client's background and to uncover mitigating psychiatric, IQ, childhood information and present it at penalty phase. The expert who examined the client before the federal evidentiary hearing found that the client was under extreme emotional stress at the time of the homicide and had very little ability to conform his conduct to the requirements of law. The expert found that these circumstances had the ability to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. Thus, this psychiatric evidence could not only constitute mitigation, but also could significantly weaken the aggravating evidence which had been presented. The same arguments apply herein.

B. Trial Counsel Failed To Investigate And Present Evidence Of Petitioner's Drug History.

Respondent asserts that there was no evidence of drug use at the time of the offense, thereby implying that petitioner's drug history was somehow irrelevant. An accurate understanding of petitioner's mental state at all critical points in the proceedings requires that the role of drugs and alcohol by investigated and presented to mental health evaluators. Indeed, Dr. Globus diagnosed petitioner as having a drug-related psychiatric disorder, amphetamine abuse. He qualified that finding with the-phrase "in remission," yet that does not render petitioner's drug history irrelevant. Drug use, especially over a prolonged period of time, can have long-term effects on an individual's cognitive functioning, especially when the

individual suffers a pre-existing organic disorder. Mr. Morris, by virtue of his brain damage, as well as his underlying emotional or psychiatric disabilities, was especially vulnerable in this respect. Moreover, Dr. Globus testified specifically about the role of amphetamines as a form of self-medication in brain-damaged adults. Petitioner's drug history, if properly explored and presented, could have confirmed Dr. Globus' findings for purposes of both competency and mitigation evidence.

XIII. THE TRIAL JUDGE IMPROPERLY DENIED PETITIONER'S MOTION OR MODIFICATION OF SENTENCE. (Claim XLI)

The trial court discussed at the motion for modification of sentence the erroneous jury instruction which was given during penalty deliberations. For all the reasons state in Section III, above, this claim should be granted.

Additionally, the trial court's reliance on Petitioner's prior convictions, which have been here challenged as invalid, as a basis to uphold the death verdict, was improper. Sochor v. Florida, 504 U.S. 527 (1992).

XIV. THE CALIFORNIA CAPITAL STATUTORY SCHEME IS UNCONSTITUTIONAL.[58]

Permitting a capital jury to rely on vague, arbitrary and invalid prior convictions, and the unchallenged facts underlying those convictions, renders the state scheme void for vagueness. Sochor v. Florida, supra; Stringer v. Black, 503 U.S. 222(1992); Williams v. Calderon, 52 F.3d 1465, 1479 (9th Cir. 1994)[finding that the 1978 death penalty statute makes California a "weighing" state].

XV. CUMULATIVE ERRORS AT BOTH PHASES OF THE TRIAL REQUIRE REVERSAL. (Claim XXXIX)

Although rejected by the state court[59], the cumulative errors at both phases of Petitioner's trial were so significant as to require reversal of his guilt and penalty convictions. United

---

58. Claim XLII

59. 53 Ca1.3d 232-33.

States v. Wallace, 848 F.2d at 1475-77; Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); Lincoln v. Sunn, 807 F.2d 805, 814 n.6 (9th Cir. 1987).

Besides those discussed at length above, among the errors which contributed to the requirement of reversal are: Claim XXIX (Prosecutorial Misconduct in Examining Defense Witnesses]; Claim XXXIII [Failure to Modify CALJIC 8.84.1]; Claim XXXIV [Failure to Delete Unnecessary Factors From Jury Consideration]; Claim XXXV [Failure to Instruct on Defendant's Decision Not to Testify at Penalty Phase]; Claim XIII [Petitioner's Absence from Some Trial Proceedings]; Claim XVII [Failure to Sequester].

XVI. THE STATE SUPREME COURT'S PROCEDURAL DEFAULT OF PETITIONER'S DECEMBER, 1995, STATE HABEAS PETITION WAS IMPROPER AND SHOULD BE DISREGARDED BY THIS COURT.

Petitioner was represented on appeal by Attorney Robert Kane. During the pendency of Kane's representation of Petitioner, the state court began requiring the filing of companion habeas corpus petitions in capital cases. Kane filed a short petition in the state supreme court on September 7, 1990. It was denied on the merits on December 13, 1990.

Federal counsel was appointed in July, 1992. Although counsel requested funds from this court to investigate new issues, this court denied the request and ordered petitioner to seek funds for unexhausted claims from the state court.

Despite Petitioner's request, the state court refused to provide any funds for investigation to Petitioner's counsel. Petitioner filed a state habeas petition on December 1, 1995, in the state supreme court. The state court denied the petition on December 6, 1995, with a default and on the merits. The fact based claims which were contained in the 1995 petition are contained in the First Amended Federal Petition, at pages 9-10. The claims raised in state court were:

Claim I. Avette Barrett's testimony was improperly admitted because it was impermissibly coerced and was false.

Claim II. Allison Eckstrom's testimony was improperly admitted because it was impermissibly coerced

and was false.

Claim III. Improper impeachment with prior convictions.

Claim IV. Failure to disclose evidence regarding jailhouse witnesses.

Claim V. Improper admission of petitioner's statements to law enforcement officers.

Claim VI. Prejudicial evidence that the trial court had excluded was admitted at trial in violation of petitioner's due process rights.

Claim VII. The evidence was insufficient for conviction of murder.

Claim VIII. Petitioner was deprived of his right to a unanimous jury determination on whether he premeditated and deliberated the homicide.

Claim IX. The failure to sequester the jury was prejudicial error.

Claim X. Admission of evidence concerning the facts underlying petitioner's prior convictions was improper and unconstitutional.

Claim XI. Improper admission of evidence in aggravation without pre-trial notice to the defense.

Claim XII. The California statue is overly broad and void for vagueness.

Claim XIII. The trial court failed to delete unnecessary factors from jury consideration at penalty phase.

Claim XIV. Ineffective assistance of trial and appellate counsel.

Claim XV. Petitioner's incompetence to assist counsel.

Claim XVI. Cumulative errors at both phases of trial require

reversal.

Claim XVII. The trial judge committed constitutional error when it responded to a jury inquiry with a legally incorrect response and permitted the jury to decide petitioner's sentence based on false information.

Claim XVIII. The trial judge improperly denied petitioner's automatic motion for modification of penalty. The state court order, in relevant part, stated:

> The petition for writ of habeas corpus, filed on December 1, 1995, is denied. All claims are based on information that as long known or should have been known to petitioner or his counsel and could have been raised in petitioner's earlier habeas corpus petition; petitioner fails to allege with particularity any fact not earlier known to petitioner. No sufficient justification has been offered to explain the delay of the successive petition, and no fundamental miscarriage of justice has been demonstrated to excuse either. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, stnd. 1-1.2; In re Clark (1993) 5 Ca1.4th 750, 797-98 [exceptions]). Accordingly the petition is denied as untimely. It is also denied on the merits. (See Harris v. Reed (1989) 489 U.S. 255, 264,fn. 10.).

Among the primary focuses of the state exhaustion petition was to present claims concerning the ineffectiveness of trial counsel in failing to investigate and present evidence concerning Petitioner's long standing organic brain damage and mental impairments. The petition alleged that had trial counsel properly investigated this evidence and consulted with appropriate experts that critical and exculpatory guilt phase defenses would have been presented. This evidence included showing that Petitioner's brain damage and mental impairments made it impossible for him to enter waivers of his rights to counsel and silence, thereby precluding use of the statements he made to law enforcement authorities in Nebraska. It was alleged that the mental state evidence also would have demonstrated Petitioner was easily subject to manipulation by others, and a prime candidate for a false and unreliable confession in his

misguided attempt to shield the real perpetrators from prosecution.At the very least, this evidence could have been used to negate specific intent and to reduce the homicide to a degree of manslaughter.

Moreover, this evi6ence could also have explained why Petitioner acted against his best interests during the pre-trial stages of the case when he made admissions to other inmates and in the letter to Barrett.

This circuit has recently held that the state supreme court's timeliness bar applied to defaults which occurred prior to the decision in People v. Clark, 5 Ca1.4th 750 (1993), cannot used to preclude consideration of claims in federal habeas corpus proceedings. Calderon v. U.S. District Court, 96 F.3d 1126, 1131 (9th Cir. 1996). See also Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), cert. denied,U.S., 1996 WL 526377.Such is the situation here. The state court found that the initial default was that of appellate counsel for failing to raise the issues in the 1990 petition. Under these two recent authorities, this court must reach the merits of petitioner's successor state habeas claims.

Alternatively, this evidence strongly suggests that Petitioner is actually innocent of the homicide of Ricky VanZant. Where a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of the claims, he must establish that a constitutional violation probably resulted in the conviction of one who is actually innocent. Schlup v. Delo, 513 U.S., 115 S.CT. 851, 867 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986). The simple fact that the trial record contained sufficient evidence to support the jury's verdict is not a reason to find the actual innocence proffer lacking. Conducting an evidentiary hearing on the innocence claim in probably the most expeditious procedure to employ, due to the fact-intensive nature of the inquiry. Schlup 115 S.Ct. at 869.

The state habeas claims are all fact based and require further factual development. Therefore, they are not susceptible to resolution on summary judgment. Where factual disputes exist, an evidentiary hearing should be ordered. Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir. 1992).

Relevant authority establishes that the fact based claims

Petitioner has made require an evidentiary hearing.[60] For instance:

Where trial counsel was ineffective in conducting voir dire, among other aspects of his client's case, habeas relief was required. Harris by and through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995). Failure to remove a biased juror constitutes ineffectiveness. Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992).

Trial counsel's failure to investigate that another person committed the homicide for which his client was on trial was ineffective assistance. Sanders v. Ratelle, 21 F.3d 1446 (9th Cir.1994).

Failure to investigate jailhouse informant constitutes ineffective assistance. In re Neeley, 6 Ca1.4th 901 (1993).

The failure to raise the defense of self defense to excessive force constitutes ineffective assistance. United States v. Span, 275 F.3d 1383 (9th Cir. 1996).[61]

The failure to properly investigate physical evidence constitutes ineffectiveness. Sims v. Livesay, 970 F.2d 1575 (6th Cir.1992); Washington v. Murray, 952 F.2d 1472 (9th Cir. 1991).

The failure to investigate mental health evidence that would have provided a guilt phase defense can constitute ineffectiveness. Maddox v. Lord, 819 F.2d 1058, 1062 (2d Cir. 1987).

These cases establish that trial counsels' performance must be further reviewed in the context of an evidentiary hearing. There are legitimate and substantial challenges to the prejudicial performance of counsel, trial and appellate, in this case.[62] This claim cannot be resolved in summary judgment

---

60. See Section XI, above, concerning factual showing with respect to Petitioner's competence to aid and assist counsel and to stand trial.

61. Here, it is possible that Petitioner could have had a defense of others claim, had he acted in response to a threat of violence to Barrett and Eckstrom.

62. If this court holds that the 1995 state habeas petition was properly denied as untimely, and that the claims should have been presented in the 1990 petition, then appellate counsel was ineffective. Under those circumstances, the default should be excused. Murray v. Carrier, supra. Otherwise, an evidentiary hearing should be held to inquire into appellate

proceedings.

CONCLUSION

For all the reasons stated herein, and in the amended habeas corpus petition, Respondent's Summary Judgment Motion should be denied and Petitioner should be granted summary judgment.

DATED:_____ Respectfully submitted,

s/ MARIANNE D. BACHERS
MARIANNE D. BACHERS
Attorney for Petitioner

---

counsel's effectiveness. Robison v. Maynard, 829 F.2d 1501, 1513 (10th Cir. 1987).

MARIANNE D. BACHERS, ESQ. - State Bar No. 94743
312 Montcalm Street
San Francisco, CA 94110
Telephone: (415) 643-5919

TONY TAMBURELLO, ESQ. - State Bar No.46037
TAMBURELLO, HANLON & WAGGNER
214 Duboce Avenue
San Francisco, CA 94103
Telephone: (415) 431-4500

Attorneys for Petitioner
BRUCE MORRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS Petitioner v. ARTHUR CALDERON Warden, Respondent	No. CIV S-92-04 EJG GGH MEMORANDUM RE: FILING OF STATE HABEAS PETITION

On April 7, 1997, this Court filed an order requiring Petitioner to explain "why it took Petitioner two years to file the exhaustion petition." This memorandum responds to that Order.

FACTUAL BACKGROUND

Bruce Morris was represented on appeal by Attorney Robert Kane. During the pendency of the direct appeal, Attorney Kane filed a short habeas corpus petition, in response to the state supreme court's newly announced rule requiring the filing of habeas petitions during the state appellate process. Attorney Kane filed the petition on September 7, 1990. The

petition was denied on the merits on December 13, 1990.

Counsel was appointed to represent Petitioner in this Court on July 30, 1992. Counsel had not represented Petitioner in state court. A Petition for Writ of Habeas Corpus was filed in this Court on June 15, 1993. Petitioner moved this Court for funds for investigation and expert assistance during the initial round of federal litigation before returning to state court. The court held that no funds would be provided for investigation for unexhausted claims. On December 6, 1993, the district court ordered Petitioner to return to state court and file an exhaustion petition.

Counsel could not immediately file an exhaustion petition without conducting further investigation. Appellate counsel had requested funds from the state supreme court on two occasions. The state court gave appellate counsel $1,450.00 for investigation and expert assistance. Thus, undersigned counsel determined that it would be futile to immediately seek funds from the state court without developing more facts in support of a funds request.

Counsel is a solo practitioner. She did not have large sums of funds available to hire investigators and paralegals to carry out these tasks. Counsel did hire people to assist her however and had work done as she could afford it. On September 21, 1994, Petition filed a Motion for Funds for Investigative and Expert Assistance in the state supreme court. On November 2, 1994, the state court denied the request in its entirety. Petitioner filed the state habeas petition on December 1, 1995, thirteen months after the denial of any funds for investigation and expert assistance.

Counsel sought and obtained detailed and complex documents and information about Petitioner's prior convictions, family history, and lifelong mental health struggles. Counsel pleaded the claims and proved the supporting facts as best she could given the situation described above.

Additionally, as this Court is aware, Petitioner has repeatedly attempted to volunteer to waive further review of his case in federal court. Very substantial amounts of time have been devoted in this case to client relations due to the Petitioner's ongoing mental status issues, of which the volunteer attempts are an indication.

ARGUMENT

The Ninth Circuit has unequivocally stated that the California Supreme Court's procedural default of a successive habeas petition cannot constitute a bar to federal review where the rule upon which the state court relied was not consistently applied and well established at the time the first state habeas petition was filed. Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994.)

This principle was reaffirmed in Calderon v. U.S. District Court (Bean)[63], 96 F.3d 1126 (9th Cir. 1996), where the Court held that Bean's default occurred before the decision in In re Clark, 5 Cal.4th 750 (1993) was announced, and thus, the procedural bar erected by the state court did not preclude federal review of Bean's claims.

This Court's inquiry is whether the state bar is adequate. The Ninth Circuit has plainly held it is not in cases with identical facts. Attorney Kane's first petition was filed at a time when the rules concerning the timeliness and content of state habeas petitions were unclear. Siripongs, Morales, and Bean all establish that the timeliness bar imposed by the state court on the second petition is invalid because the original default occurred at a time when counsel had not notice of the potential for default. Moreover, the time spent working on Petitioner's second state habeas petition is not excessive given that Bean spent substantially more time in bringing his case to the state court than did Petitioner.

---

63. As the Bean opinion notes, Bean was ordered to return to state court to file an exhaustion petition in September, 1991. The exhaustion petition was filed in May, 1994, two years and nine months after the order to file in state court was issued. Bean took substantially longer that petitioner to file in state court but the federal court still reached the merits of his claims because the state court timelines bar, virtually identical to Petitioner's, was legally insufficient.

Under these circumstances, this Court should reject the state procedural bar and reach the merits of all of Petitioner's claims.

DATED: April 25, 1997

Respectfully submitted,

MARIANNE D. BACHERS
Attorney for Petitioner

STATUTES AND RULES INVOLVED IN THE CASE

Section 3006A of Title 18 of the United States Code provides in pertinent part as follows:

> (a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:
>
> ****
>
> (2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who--
>
> ****
>
> (B) is seeking relief under section 2241, 2254, or 2255 of title 28.

Prior to April 24, 1996, Section 848 of Title 21 of the United States Code provided in pertinent part as follows:

> (B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)
>
> * * * *
>
> (6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in

felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

****

(9) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10).

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

Section 2243 of Title 28 of the United States Code provides in pertinent part as follows:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Section 2254(e) of Title 28 of the United States Code provides in pertinent part as follows:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Rule 1 of the Federal Rules of Civil Procedure provides:

These rules.... shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
....

(e) Form of Affidavits; Further Testimony; Defense Required.

****

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 6 of the Rules Governing Section 2254 Cases provides in pertinent part as follows:

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under > 18 U.S.C. S 3006A(g).

Rule 7 of the Rules Governing Section 2254 Cases provides in pertinent part as follows:

(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

Rule 8 of the Rules Governing Section 2254 Cases provides in pertinent part as follows:

> (a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Local Rule 81-191 of the United States District Court for the Eastern District of California provides in pertinent part as follows:

> The application of this Rule may be modified by the Judge or Magistrate Judge to whom the petition is assigned. These Rules shall supplement the Rules Governing S> 2254 Cases and do not in any regard alter or supplant those rules.
>
> * * * *
>
> (d) Counsel.
>
> (1) Appointment of Counsel. Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to proceed pro se and the Court is satisfied, after hearing, that petitioner's election is intelligent, competent and voluntary.
>
> * * * *
>
> (2) Second Counsel. Appointment and compensation of second counsel shall be governed by Section 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases.
>
> * * * *
>
> (h) Stays of Execution.
> (1) Stay Pending Final Disposition. Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the District Court shall issue a stay of execution pending final disposition of the matter.
>
> * * * *

(3) Temporary Stay for Preparation of the Petition. Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented.

* * * *

(5) Temporary Stay for Unexhausted Claims. If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court.

* * * *

(1) Respondent shall as soon as practicable, but in any event on or before twenty (20) days from the date of service of the petition, lodge with the Court the following: (A) transcripts of the state trial court proceedings; (B) appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that Court; (C) petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings;

* * * *

(5) No discovery shall be had without leave of the Court.

(6) Any request for an evidentiary hearing by either party shall be made within fifteen (15) days from the filing of the traverse, or within fifteen (15) days from the expiration of the time for filing the traverse. The request shall include a specification of which factual issues require a hearing and a summary of what evidence petitioner proposes to offer.